Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

MORA HOTEL CORPORATION N.V. and CHASCONA N.V.,

Petitioners,

v.

CIBC MELLON TRUST COMPANY, as Trustee of Chrysler Canada, Ltd.'s Benefits Plan and Others, and DAIMLER CHRYSLER CANADA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The New York Court of Appeals affirmed recognition of $300 million in judgments issued by an English court against Petitioners as sanctions for Petitioners' failure to comply with English Mareva Orders. Petitioners argued that the English court lacked jurisdiction over them and that recognition of the judgments would violate Petitioners' due process rights under the Fourteenth Amendment. The New York Court of Appeals held that Petitioners' jurisdictional defense was "abrogated" because of a court appearance by Petitioners in England two years after the judgments were issued. The New York court cited the Uniform Foreign Money Judgment Recognition Act as authority for this "abrogation."

   Can the defense that a court lacked personal jurisdiction to issue a judgment be abrogated under state law by a post-judgment appearance?

2. The conclusion by the New York Court of Appeals that Petitioners' due process rights were abrogated by a post-judgment appearance allowed that court to avoid discussing the extreme "conspiracy jurisdiction" on which the appeal centered. In order to enforce English judgments in the United States, Respondents must show that the English assertion of jurisdiction comported with American due process standards. However, all parties agree that the English court asserted jurisdiction over Petitioners based upon a provision of English law that does not require "minimum contacts." Rather, England asserted jurisdiction over an alleged remote fraudulent conspiracy based solely on the fact that one alleged co-conspirator (out of fifty defendants) maintained a domicile in England years after the alleged conspiracy took place. There was no allegation that the conspiracy caused acts or harmful effects in England, nor was it alleged that Petitioners had any business

connections to England. In the absence of clear guidance by this United States Supreme Court (hereinafter the "Court"), the lower New York courts attempted to reconcile this exercise of jurisdiction with our due process standards by using the ambiguous concept of conspiracy jurisdiction. Although admittedly a due process concern, conspiracy jurisdiction is erratically applied by federal and state courts, with dramatically conflicting standards depending on the venue.

Does due process allow the exercise of personal jurisdiction over a non-resident defendant with no business contacts in England, under a co-conspiracy theory, where there are no acts or harmful effects in England and jurisdiction over that defendant was based solely on a residence of one alleged co-conspirator in England?

3. The course of conduct followed by Petitioners in defending against Respondents' claims could not have resulted in a waiver of jurisdictional defenses if these claims had been brought in a federal or state court. However, the decision of the New York Court of Appeals concluded that such a waiver had occurred, citing its authority to recognize foreign judgments. The decision thus accords Petitioners less due process protection against a foreign judgment that is *coram non judice* than would be accorded against a like state or federal judgment.

Can the due process standards for exercising personal jurisdiction be applied differently as between domestic judgments and foreign judgments for which enforcement in sought in state courts?

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are corporations whose sole business is owning and operating the Gorham Hotel in New York City. Petitioners' business operations are exclusively in New York. All of Petitioners' offices, employees and assets, including any bank and investment accounts, are located in New York. Petitioners conduct no business in England, own no property in England, have no bank accounts in England, maintain no offices or telephone numbers in England, and no employee of Petitioners has ever even visited England for business purposes. Petitioners have no parent corporations and no publicly held company owns 10% or more of the stock of either of the Petitioners. Petitioners were the defendants before the state motion court, and were appellants before the state appellate courts.

Respondents

Respondents are both Canadian corporations located in Canada. Respondent CIBC Mellon Trust Company is based in Toronto and appears in its capacity as trustee for various Canadian funds related to Respondent DaimlerChrysler Canada Inc., which is based in Windsor, Ontario. Respondents were plaintiffs before the state motion court, and respondents before the state appellate courts.

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Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Court of Appeals of the State of New York in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York, dated May 8, 2003, is published at 100 N.Y.2d 215 (N.Y. May 8, 2003) and reprinted in Appendix A. The decision and order of the Supreme Court, Appellate Division, First Department, dated May 28, 2002, is published at 296 A.D.2d 81 (N.Y. A.D. 1st Dept. May 28, 2002) and reprinted in Appendix B. The unpublished judgment and order of the Supreme Court, County of New York, dated January 5, 2001 is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on May 8, 2003. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following Constitutional and statutory provisions:

A. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part, that: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . ."

B. Section 5305 of the New York Civil Practice Law and Rules, a provision of Article 53, for the Recognition of Foreign Country Money Judgments, which provides, in pertinent part, that:

"(a) Bases of jurisdiction: The foreign country judgment shall not be refused recognition for lack of personal jurisdiction if:

. . .

2. the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him."

STATEMENT OF THE CASE

Respondents brought suit in New York to recognize over $300 million in default judgments against Petitioners that were issued by an English court ("the English Judgments"). Petitioners argued to the New York courts that they had no minimum contacts with England, and that the English Judgments were therefore void for lack of jurisdiction.

This petition involves the power of a state court to reject Fourteenth Amendment arguments that a judgment is void for lack of personal jurisdiction. On May 8, 2003, the New York Court of Appeals affirmed summary judgment for Respondents, recognizing the English Judgments (the "State Decision"). In doing so, the court refused to consider Petitioners' argument that they had no minimum contacts with England. The court found that this argument was "abrogated" by an appearance in England occurring years after the English judgments had been issued. The New York court thus fashioned a new basis for personal jurisdiction - the "retroactive appearance" - the only retroactive basis for jurisdiction recognized by American courts. This new form of jurisdiction is wholly in conflict with the Constitution and centuries of precedent. Moreover, the State Decision is of unusually strong influence, as it was issued under the purported authority of the Uniform Foreign Money Judgment Recognition Act (the "Uniform Act"), which has been enacted by thirty-two states and the District of Columbia.

The second issue in this petition involves the reach of state long-arm jurisdiction in the context of recognizing foreign money judgments. Due process requires that, in

order for American courts to recognize a foreign judgment, it must have been issued by a court with jurisdiction over the defendant that comports with our Constitutional standards. *See, e.g., Griffin v. Griffin*, 327 U.S. 220, 229 (1946), *reh'g denied*, 328 U.S. 876 (1946) (Stone, J.) ("[d]ue process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process"). Thus, the New York courts could not properly recognize the English Judgments unless the assertion of jurisdiction by the English courts comported with our "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This means that England must have the same "minimum contacts" with Petitioners that a state is required to have to exercise jurisdiction under the Fourteenth Amendment. *Id.* Since English courts do not have the same due process restraints as the United States, but rather assert jurisdiction in situations that would not be permitted by our Constitution, this is a vital inquiry.

Indeed, the English Judgments were issued pursuant to an English jurisdictional provision that does not require any minimum contacts. Appendix B at 35a n.5. Pursuant to English statute, English courts may assert jurisdiction over alleged co-conspirators to fraud where one alleged conspirator simply resided in England at the time the writ was issued. There is no requirement that the alleged conspiracy have any connection to England, nor that any other defendant have contacts with England. Such was the case here, as Petitioners have no contacts with England, and no evidence was offered in England or on the motion for summary judgment in the United States to show that the alleged conspiracy involved acts or harmful effects in England. In fact, the English court affirmatively declared that no acts related to the conspiracy took place in England.

Recognizing the English Judgments, the New York courts ignored the law holding that, in such a situation,

minimum contacts do not exist and jurisdiction is lacking. Rather, the lower New York courts pushed forward a sprawling doctrine of co-conspirator long-arm jurisdiction that goes well beyond the reach allowed by the Constitution. As noted above, the Court of Appeals refused to review Petitioners' jurisdictional arguments, finding that Petitioners' post-judgment appearance in England retroactively validated the English Judgments entered years earlier in proceedings that had closed. In addition to contradicting long-standing Constitutional principles and precedent, the Court of Appeals' decision impermissibly applies different rules to foreign country judgments than it would to domestic judgments, though the relevant Constitutional inquiry concerning personal jurisdiction is the same.

Petitioners ask the Court to review these due process questions as they arise in the increasingly important context of foreign judgments. The growing international nature of business makes it easier for plaintiffs who seek judgments against American residents to shop for favorable forums internationally. If American courts do not enforce due process guarantees on all judgments prior to enforcement, foreign forums with lesser guarantees of due process will become broad avenues for circumventing our Constitutional protections, making our residents, and the property owned in this country, subject to the laws of foreign nations.

The Facts Leading To The English Judgments

Respondents in this case are Canadian corporations that claim substantial losses from investment in Castor Holdings, Inc. ("Castor"), also a Canadian company. Appendix A at 2a. Castor's unexpected bankruptcy in 1992, a few months after its auditors valued the company at $1.8 billion, rocked the Canadian financial community. The Castor collapse spawned wide-spread litigation in Canada, and an extensive investigation by the Royal Canadian Mounted Police ("RCMP"), the Canadian national police service. The eight-year RCMP investigation

resulted in a 41-count criminal indictment against Wolfgang Stolzenberg, Castor's President, CEO and Chairman. Appendix B at 15a n.1. Petitioners were never considered suspects in the Castor fraud by the RCMP.

Nonetheless, in 1996, Respondents filed suit against more than thirty defendants (later increased to over fifty defendants, including Petitioners), alleging a fraudulent conspiracy. Respondents did not bring this suit in Canada, where the critical events occurred and where the evidence resided. The suit was filed in England, a jurisdiction having no connection to the parties or the dispute.

Under English law, anyone in the world who is deemed, in the judge's sole discretion, to be a "necessary or proper" party to a pending action, can be sued. Rules of the Supreme Court of England, Order 11, Rule 1(1)(c). There is no requirement of minimum contacts with England. All that England requires is that one defendant be a domiciliary of England at the time the writ is issued, after which jurisdiction may be had against anyone else anywhere. In this case, Stolzenberg's alleged domicile in London was the "anchor" and no other jurisdictional showing was made for the other defendants. Appendix A at 3a. The fact that the English court exercised jurisdiction without requiring any contacts between England and the Petitioners or the alleged conspiracy was noted by the New York appeals court. Appendix B at 35a n.5.

England was also a desirable forum for Respondents because it provides a confiscatory form of provisional relief known as the "Mareva" order. The Mareva order, which freezes assets worldwide and compels invasive financial discovery before issue is joined, has been aptly and disapprovingly described by this Court as "the nuclear weapon of the law." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 329 (1999). Respondents had obtained a Mareva order against Petitioners even before serving the statement of claim.

Respondents' original statement of claim alleged a fraudulent conspiracy, but did not allege that Petitioners were part of the conspiracy. It alleged only a "tracing" claim against Petitioner Mora Hotel Corporation ("Mora"), seeking to recover approximately $600,000 in funds allegedly tainted by fraud. Petitioner Chascona was not even named in the suit at that time. Appendix A at 3a. Marco Gambazzi, a Swiss lawyer, was the alleged link between Mora and Castor. *Id.* at 2a. He was both a director and part owner of Petitioners, as well as an outside director of Castor. *Id.* Respondents contended that, by virtue of his role as an outside director, Gambazzi "must have known" about Stolzenberg's fraud.

Petitioner Mora made a special appearance in these proceedings for the limited purpose of contesting jurisdiction. *Id.* at 3a. Given that English law allows such a broad exercise of jurisdiction, however, the appeal was necessarily limited to the issue of Stolzenberg's residence in London at the time of the service of the writ, and was ultimately unsuccessful in the House of Lords. *Id.* at 3a-4a. During the course of these appeals, Petitioner Mora refused to comply with Mareva orders. *Id.* at 4a.

As a sanction for not complying with the Mareva orders, the English court "debarred" Mora from defending Respondents' claims, and issued judgment against Mora for the full amount of the $600,000 claim. *Id.* at 4a; Appendix B at 19a. Knowing that Petitioners would be debarred for failure to comply with Mareva orders, Respondents asserted a new claim that both Petitioners were co-conspirators, amending their statement of claim to seek $300 million against Petitioners. Appendix A at 4a.

The amendment was ostensibly based on imputing to Petitioners the supposed acts of Gambazzi (to whom the acts of Stolzenberg were imputed). It is notable that, at Respondents' instigation, the Public Prosecutor for the Canton of Ticino, Switzerland, conducted a comprehensive three-year investigation into Gambazzi, and

issued a forty-page ruling (Ruling No. 2062/2000/MR/AN (July 7, 2000)) concluding that there were "no grounds for maintaining an accusation [of fraud]" against Gambazzi. Nonetheless, the amendment was allowed, new bar orders were entered and Respondents obtained default judgments against Petitioners for the full $300 million. Appendix A at 5a. These sanctions were issued at a time when the jurisdictional appeal was still pending and an answer to the amended statement of claim was not yet due.

Since all of Petitioners' assets are in New York, Respondents immediately came to New York (while Petitioners' jurisdictional appeals were still pending in England) and sought recognition and enforcement of the English Judgments.

The New York State Court Proceedings

Shortly after filing their complaint, before any discovery took place, Respondents moved for summary judgment granting recognition of the English Judgments. Three New York courts reviewed Respondents' motion for summary judgment – the motion court, the intermediary Appellate Division and the Court of Appeals – and all three offered entirely different, and conflicting, rationales for recognizing the judgments. The motion court held that the English courts' denial of Petitioners' jurisdictional appeals (which were made under English law and limited to questions of Stolzenberg's domicile) was *res judicata*, a holding that was overturned on appeal. Appendix B at 28a-32a. Upon entering summary judgment, the motion court directed the receiver it had previously appointed to sell Petitioners' sole asset, the Gorham Hotel, refusing to issue a stay pending appeal.

Petitioners appealed, and on December 5, 2001, pending decision on appeal, Petitioners commenced a new proceeding in England, applying for leave to vacate the $300 million default judgments and contest the underlying cause of action on the merits (the "Post-Judgment

Application"). These acts took place well after the litigation in England had concluded, and while Petitioners were facing the loss of their sole asset in the imminent sale of the Hotel.

When the Appellate Division decided the appeal, it rejected the lower court finding of *res judicata*, since the English Judgments of course do not address the same question in this case – namely, whether jurisdiction existed under American Constitutional standards. Appendix B at 28a-32a.

The Appellate Division also clarified the Constitutional nature of this inquiry, citing twice to *International Shoe*. *Id.* at 26a, 28a. However, it also ruled that minimum contacts with England could be founded upon co-conspirator allegations, despite the fact that it was never proven that the alleged conspiracy involved acts or harmful effects in England, except for a single alleged co-conspirator's apartment in London at the time the writ was issued.[1] Appendix B at 41a-42a.

After accepting an appeal as of right based on the presence of a Constitutional question, the Court of Appeals offered the most radical holding of the three. The court held that, because of the Post-Judgment application, Petitioners' Fourteenth Amendment arguments would be deemed "abrogated," citing to the New York enactment of the Uniform Act. Appendix A at 9a.

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1. Respondents sought to manufacture connections between the alleged conspiracy and England for the purpose of the New York proceedings, making conclusory claims of such contacts without citation to facts. Respondents submitted no new affidavits based on personal knowledge in these proceedings, relying exclusively on documents submitted in England. Unsurprisingly, these documents neither show nor even allege a conspiracy connection with England. Indeed, the English court went so far as to hold that Respondents could not utilize a jurisdictional provision based on harmful acts occurring in England, implicitly holding that there was no evidence of any such acts. *See Canada Trust Co. v. Stolzenberg*, Case No. 1996 4995 (Ch D May 23, 1997) (Rattee, J.) (Eng.).

Petitioners' due process arguments were supposedly abrogated by Section 5305(a) of the New York Civil Practice Law and Rules, which states that a foreign country money judgment "shall not be refused recognition for lack of personal jurisdiction if . . . (2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him."

The Court of Appeals applied the statute in a patently unconstitutional manner, construing the phrase "in the proceedings" to include the Post-Judgment Application that was made in 2001, years after the proceedings leading to the English Judgments were closed in 1999. As the English court stated in its Post-Judgment Application decision, "it is to be noted that the [original] Proceedings [on which the default judgment was based] have already come to a conclusion." *Stolzenberg*, 2003 WL 117093 at ¶¶4, 112.

Centuries of precedent from this Court, and countless other courts, hold that a judgment that is void for lack of jurisdiction is *coram non judice*, and may not be retroactively resuscitated. Nonetheless, the New York Court of Appeals interpreted the state statute to "abrogate" Petitioners' Constitutional rights on just such grounds, affirming the grant of summary judgment against Petitioners and recognizing the English Judgments.

Given the powerful influence of the New York decision, which interprets the Uniform Act and is thus statutorily prescribed as persuasive precedent in over thirty states, Petitioners ask the Court to clarify that jurisdiction cannot be retroactively inserted into a void judgment. Also, the Court has yet to rule on the Constitutionality of conspiracy jurisdiction, a concept that has spawned extreme theories that are applied erratically by federal and state courts throughout the country. Petitioners ask that the Court clarify the Constitutionality of the concept and its application to this case.

REASONS FOR GRANTING THE PETITION

I. Petitioners' Defense To Recognition That The English Court Lacked Jurisdiction May Not Be Constitutionally Abrogated Under Color Of State Law By Petitioners' Post-Judgment Application In England

A. If The English Court Lacked Jurisdiction, The English Judgments Are *Coram Non Judice* And May Not Be Retroactively Validated

The New York Court of Appeals used Petitioners' Post-Judgment Application in December 2001 to retroactively insert jurisdiction into judgments that were rendered without jurisdiction in 1999. In doing so, it violated the centuries-old Constitutional principle that a judgment rendered without jurisdiction is void – not merely voidable – and cannot be retroactively validated. As the Court discussed in *Burnham v. Superior Court of California*, 495 U.S. 604, 608-09 (1990):

> The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, see *Bowser v. Collins*, Y.B.Mich. 22 Edw. IV, f. 30, pl. 11, 145 Eng.Rep. 97 (Ex. Ch. 1482), and was made settled law by Lord Coke in *Case of the Marshalsea*, 10 Coke Rep. 68b, 77a, 77 Eng.Rep. 1027, 1041 (K.B. 1612). Traditionally that proposition was embodied in the phrase coram non judice, "before a person not a judge"—meaning, in effect, that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present, and could therefore not yield a judgment. American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted. *See, e.g., Grumon v. Raymond*, 1 Conn. 40 (1814); *Picquet v. Swan*, 19 F. Cas. 609 (No.

> 11,134) (CC Mass. 1828); *Dunn v. Dunn*, 4 Paige 425 (N.Y. Ch. 1834); *Evans v. Instine*, 7 Ohio 273 (1835); *Steel v. Smith*, 7 Watts & Serg. 447 (Pa.1844); *Boswell's Lessee v. Otis*, 9 How. 336, 350, 13 L. Ed. 164 (1850). In *Pennoyer v. Neff*, 95 U.S. 714, 732, 24 L. Ed. 565 (1878), we announced that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment as well.

The principle was explained further in *Pennoyer v. Neff*, 95 U.S. 714, 732-33, 24 L. Ed. 565 (1878), which held that

> [s]ince the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.

Pennoyer explained that the jurisdiction of a court:

> cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. . . . The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. . . . This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. (*Id.* at 728)

Pennoyer has been applied by the highest courts of at least two states to hold that a judgment rendered without personal jurisdiction cannot be retroactively validated by

a post-judgment appearance. *See Keen v. Keen*, 60 A.2d 200, 205 (Md. 1948); *Wiles v. Wiles*, 315 P.2d 131, 134 (Or. 1957).

The principle of *coram non judice*, as discussed in *Burnham* and *Pennoyer*, was also explained in the precise context raised in this petition – namely, a post-judgment motion to vacate that was held to supply the jurisdictional predicate for the judgment sought to be vacated – by the Supreme Court of North Carolina in *Monroe v. Niven*, 20 S.E.2d 311, 313 (N.C. 1942):

> When a court of general jurisdiction undertakes to grant a judgment in an action where it has not acquired jurisdiction of the parties by voluntary appearance or the service of process, the judgment is absolutely void and has no effect. It may, therefore, be disregarded and treated as a nullity everywhere. It is *coram non judice*. . . . A general appearance to move to vacate a void judgment does not validate a judgment rendered without service of process. "A nullity is a nullity, and out of nothing nothing comes. *Ex nihilo nihil fit* is one maxim that admits of no exceptions."

The Oregon Supreme Court analyzed this issue in *Wiles*, 315 P.2d at 134, explaining that:

> But when one moves to vacate a decree void on its face as a futile attempt at a judgment *in personam*, even if the motion be by a general appearance, it will not infuse a void judgment with the vitality which it lacks. 'The judgment, if void when rendered, will always remain void; * * * the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently.' *Pennoyer v. Neff*, (24 L. Ed. 570-571). The validity of a judgment is determined as of the date of its rendition and, if void, it

> remains so forever. Nor is a judgment ratified by moving to set it aside, or thus made better or worse. [citations omitted] . . .
>
> It is this very absence of vitality in a void judgment from the moment of its rendition that tends to explain why defendant's appearance in the matter, be it called general, cannot operate retroactively to give it life. A void judgment has been variously and picturesquely described many ways as wanting in any value or substance which can be revived. It has been termed: 'mere waste paper' [and] 'the mere image of a judgment.' [citations omitted] . . . .
>
> It is not only a denial of due process to enforce a judgment rendered without jurisdiction (*Pennoyer v. Neff*, 24 L. Ed. 572) but the mere act of fixing a sum due when the court is without jurisdiction is likewise an abortive exercise of judicial power repugnant to the Fourteenth Amendment. *Riverside & Dan River Cotton Mills, Inc. v. Menefee*, 237 U.S. 189, 35 S. Ct. 579, 59 L. Ed. 910 [1915]; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959, 963 [1874].

Petitioners' argument, asserted throughout the New York proceedings, is that the English Judgments were rendered by a court without personal jurisdiction – in other words, they are *coram non judice* under the Court's holdings in *Burnham* and *Pennoyer* and the protections of the Fourteenth Amendment. As the law makes clear, a post-judgment appearance is ineffectual to reincarnate such a null judgment. The decision of the New York Court of Appeals to the contrary affirms recognition of a void foreign judgment against Petitioners, in violation of their Fourteenth Amendment rights.

In addition to the cases cited above, the precedent on this question goes back centuries and continues to the present time.

In *Roberts v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 51 N.W. 478, 479 (Minn. 1892), *aff'd*, 164 U.S. 703 (1896), the court rejected the argument that "by the motion to vacate the defendant submitted to the jurisdiction of the court, and so made valid the judgment, even though it was rendered without jurisdiction." *See Bischoff v. Wethered*, 76 U.S. 812, 814 (1870) (refusing to enforce English judgment and holding "it is enough to say that [the English proceeding] was wholly without jurisdiction of the person, and whatever validity it may have in England . . . it can have no validity here, even of a *prima facie* character. It is simply null").

In *First National Bank v. Cunningham*, 48 F. 510 (C.C.D. Ky. 1891), the United States Court of Appeals cited to and quoted from *Godfrey v. Valentine*, 40 N.W. 163, 164-65 (Minn. 1888), which held that:

> The course of the moving party in thus seeking to have a void judgment set aside . . . but at the same time consenting and asking that the court shall now hear and adjudicate upon the cause, may justify the court in entertaining the cause and proceeding as in an action pending in which the defendant has voluntarily appeared. But in thus urging his legal right, and thus invoking and consenting to the future action of the court, the moving party should not be deemed to have conferred jurisdiction retrospectively, so as to render valid the previous judgment, which, being unsupported by any authorized judicial proceedings, was not merely voidable, but void, and in legal effect a nullity.

This long-established law was reiterated more recently by state high courts in *Marriage of Verdung*, 535 N.E.2d 818, 820 (Ill. 1989) ("a party who submits to the court's jurisdiction does so only prospectively and the appearance does not retroactively validate orders entered prior to that date") and *Weaver Construction Co. v. District Court In and For El Paso County, 4th Judicial Dist.*, 545 P.2d 1042,

1046 (Colo. 1976) ("general appearance subjected [defendant] [o]nly to the jurisdiction of the court from the date of the appearance, and is not retroactive as to validate the void judgment").

The highest court of Washington held in *Woodham v. Anderson*, 73 P. 536, 538 (Wash. 1903) that:

> [Defendants' general appearance] brought them within the jurisdiction of the court for all future proceedings in the cause .... But what had theretofore been done was done without jurisdiction. The judgment previously entered was void. Their general appearance at that time did not validate the void judgment, but simply brought them into court, without the necessity of new process, to be dealt with thereafter as the law of the case required.

See also Lore v. Citizens Bank of Winslow, 75 P.2d 371, 372 (Ariz. 1938) ("Appearance after such a judgment is entered against a party, whether general or special, will not cure a want of jurisdiction as to the judgment previously obtained"); *Moore v. Watkins*, 1 Ark. 268 (1839); *Gray v. Hawes*, 8 Cal. 562 (1857); *Davis v. Schimmel*, 482 S.W.2d 785, 790 (Ark. 1972) ("appearance does not cure any decrees previously entered in the case which are void for want of notice or process"); *Doyle v. Wilcockson*, 169 N.W. 241, 244 (Iowa 1918) ("a judgment which is void for want of notice can no more be validated after entry of judgment by any waiver of notice than it could be by serving a proper notice after judgment"); *Briggs v. Sneghan*, 45 Ind. 14 (1873); *Shaw v. Rowland*, 4 P. 146 (Kan. 1884); *Ivaldy v. Ivaldy*, 59 N.W.2d 373, 374 (Neb. 1953) (citing and quoting from numerous applicable and controlling authorities and concluding that a "general appearance does not relate back so as to validate the void proceedings. Its only effect is to confer jurisdiction over the person of defendant from its date"); *Gassett v. Snappy Car Rental*, 906 P.2d 258, 262 (Nev. 1995); *Eaton v. Cooke*, 393 P.2d 329 (N.M. 1964); *Harrington v. Rice*, 97 S.E.2d 239 (N.C. 1957); *Lathrem v. Foreman*, 151 N.E.2d 905, 908 (Ohio 1958)

("[d]efendant's subsequent appearance . . . in attempting to have the judgment vacated did not operate retroactively to place him before the court when the original judgment was rendered"); *State v. Cohen*, 13 S.C. 198 (1880); *Gallagher v. National Nonpartisan League*, 205 N.W. 674, 675 (N.D. 1925)

> [n]or do we believe that this void judgment became vested with life and validity because the defendants, when they sought relief against the judgment, made a general appearance . . . the general appearance of the defendants thus made did not operate retrospectively, so as to render valid the previous judgment, which in legal effect was a mere nullity . . . ;

Martin v. Cobb, 14 S.W. 162, 163 (Tex. 1890) ("The judgment was void when rendered. The filing of a motion to set it aside or the overruling of the motion, could not make it better or worse"); *Bennett v. Supreme Tent of Knights of MacCabees*, 82 P. 744, 746 (Wash. 1905). *Accord Telesco v. Telesco*, 447 A.2d 752, 755 (Conn. 1982) ("[a] void judgment is not subject to judicial reincarnation by the filing of written pleadings post judgment"); *Kohler Co. v. Department of Indus., Labor and Human Relations*, 259 N.W.2d 695, 701 (Wis. 1977) "[when court acts] in excess of its jurisdiction, its orders or judgments are void . . . A void judgment cannot be validated by consent, ratification, waiver, or estoppel"); *2-H Ranch Co. v. Simmons*, 658 P.2d 68, 72-73 (Wyo. 1983) (void judgment is "nullity," "entitled to no force or effect," and "subsequent acts taken on a nonexistent judgment must be void").

That Petitioners fall under this line of precedent is underscored by the facts. When Petitioners appeared in England and moved to vacate the English Judgments, the English court pointedly stated that "it is to be noted that the [original] Proceedings [on which the default judgment was based] have already come to a conclusion." *Stolzenberg*, 2003 WL 117093, ¶¶4, 112. Indeed, the proceedings on Petitioners' motion to vacate in 2002 and 2003 even bore different case numbers from the original 1996 proceedings on which the default was based. *See Id.; CIBC Mellon Trust Company v.*

Mora Hotel Corp. NV, Case No. CHANF/A3/2002/1106, 2002 WL 31476476 (CA Nov. 28, 2002) (Eng.).

As the precedent cited above indicates, the idea that an appearance in different proceedings years after a judgment was issued can be used as a means to validate and enforce the prior judgment entered *coram non judice* is repugnant to our Constitution.

B. The Authorities Cited By The New York Court Of Appeals Are Misplaced

The New York Court of Appeals ignored the wealth of cases cited by Petitioners indicating that a post-judgment appearance cannot retroactively validate a judgment that is void for lack of jurisdiction. Instead, the court asserted that the state enactment of the Uniform Act, and two Restatements, make no distinction between pre- and post-judgment appearances. Appendix A at 13a. The court's reliance on these authorities is misplaced. As noted above, the provisions of the Uniform Act may conform with due process protections if the clause "in the proceedings" is given its natural interpretation to mean "in the proceedings that lead to the judgment," rather than to mean "in any proceedings at any time," as held by the New York court.

Nor do the Restatements support the State Decision. Section 421 of the *Restatement (Third) of Foreign Relations Law* – the very section cited in the State Decision – recites that the reasonableness of jurisdictional is determined by looking at circumstances "at the time jurisdiction is asserted." *Id.* at § 421(2) (1987); Appendix A at 13a. The other cited provision, *Restatement (Second) of Conflict of Laws* § 33 cmt. b (1977), states that a post-judgment appearance may subject one to the jurisdiction of the court, but does not indicate that jurisdiction can retroactively validate the prior judgment. On the contrary, the same comment states that "[a] judgment rendered on the basis of a so-called appearance which does not satisfy the Constitutional requirements, as laid down by the Supreme Court of the United States, is void in the State of rendition itself." Thus, this comment as a whole is in

harmony with the precedent cited herein. When a post-judgment appearance is made, the court may obtain - from that time forward - jurisdiction, but judgments before such appearance are void and *coram non judice*, not susceptible to judicial reincarnation. *Id.*

The New York Court of Appeals also relied on the holdings of two federal district court cases, which it stated "involved post-judgment appearances," citing *Nippon Emo-Trans Co. v. Emo-Trans, Inc.*, 744 F. Supp. 1215 (E.D.N.Y. 1990) and *S.C. Chimexim S.A. v. Velco Enterprises Ltd.*, 36 F. Supp. 2d 206 (S.D.N.Y. 1999). Appendix A at 10a-11a. The Court of Appeals misinterprets the holdings of both of these cases, as neither supports its concept of a retroactive appearance.

In *S.C. Chimexim*, plaintiff sought to recognize a Romanian judgment against a Connecticut company for breach of contract. The Connecticut company had defaulted at the trial level, but had appeared and argued the merits of the case at the appellate level. 36 F. Supp. 2d at 210. Thus, while the appearance might be termed "post-judgment," referring to the trial court, it was "pre-judgment" with regard to the appellate court, which ruled for plaintiff on the merits after defendant had argued the merits to that court.[2]

These facts are in striking contrast to this case, where Petitioners did not argue on the merits to the English courts at any level. Rather, after exhausting the English appeals process on the jurisdictional issue, and after those proceedings had concluded, Petitioners sought leave to vacate the prior judgment and have new proceedings on the merits in the future. These proceedings never took place because leave was not granted.

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2. There was also no doubt that the Romanian court properly had jurisdiction over the defendant in accordance with American due process standards at the time the judgment was rendered. 36 F. Supp. 2d at 215-16. The defendant maintained a corporate office in Romania, conducted regular business there and the dispute arose from business conducted by defendant through the Romanian office. *Id.* In contrast, here, Petitioners have no contacts with England on which to predicate jurisdiction.

The other federal case cited by the New York Court of Appeals in support of its doctrine of retroactive appearance is *Nippon*. However, *Nippon* did not involve any such holding. In *Nippon*, plaintiff sought recognition of a Japanese judgment against a New York company. The defendant challenged jurisdiction before the Japanese courts and lost. The defendant then went to trial and lost. 744 F. Supp. at 1218. The judgment for which recognition was sought was the judgment issued after trial on the merits. *Id.*

The New York court ignored centuries of precedent from this Court and the high courts of dozens of states, establishing that a judgment issued without personal jurisdiction is void and may not be retroactively validated. Instead, the court cites to a sparse collection of authorities, none of which support its defiant practice of judicial reincarnation. The State Decision should be reversed as a violation of Petitioners' due process rights.

C. The Question Of Abrogating A Constitutional Right Is One Of Federal Constitutional Law To Be Determined By The Court, And May Not Be Decided Under Color Of State Law

Petitioners' primary argument throughout the New York proceedings was that the English court lacked jurisdiction, in violation of their Constitutional rights. This was openly acknowledged by the New York Appellate Division, which twice cited to *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) in framing the legal issues of this case (Appendix B at 36a, 38a), and by the Court of Appeals as well. Appendix A at 5a. However, the New York Court of Appeals phrased its decision so as to attempt to avoid review by this Court, asserting that its decision was being rendered under the state enactment of the Uniform Act instead of the Constitution. *Id.* at 9a, 13a.

This holding by the New York Court of Appeals – that a state statute "abrogated" Petitioners' Fourteenth Amendment

right to question whether a judgment violated due process - conflicts with entrenched Constitutional law. *Id.* at 9a. This conflict is present whether the decision of the New York Court of Appeals is treated as an expansive application of long-arm jurisdiction or an expansive rule for waiving jurisdictional arguments.

New York is not free to assert jurisdiction in derogation of Constitutional protections.[3] *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984) ("the Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant"); *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). These Fourteenth Amendment protections apply equally whether a defendant is facing enforcement of a domestic or foreign judgment. *See Griffin*, 327 U.S. 220. *See also Boivin v. Talcott*, 102 F. Supp. 979, 981 (N.D. Ohio 1951) ("A judgment obtained in a Canadian court without jurisdiction as viewed under our laws assuredly can have no greater force or effect than if it had been obtained in our courts").

States have enacted a wide variety of long-arm statutes to empower their courts to exercise personal jurisdiction over non-resident defendants. Some long-arm statutes seek to extend the state's jurisdiction to Constitutional limits, while others stop short of the full reach of the Constitution. However, a state may not apply its long-arm statute to exercise jurisdiction that is broader than that which is permitted under federal due process principles as

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3. Nor can New York avoid review by this Court of their disposition of a constitutional claim by casting it in another light. *Williams v. North Carolina*, 325 U.S. 226, 236, *reh'g denied*, 325 U.S. 895 (1945) (states cannot "avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact") (citing *Norris v. Alabama*, 294 U.S. 587, 590 (1935)). The characterization by the New York Court that it was merely interpreting state law should not distract from the fundamental Constitutional questions at issue or the radical result of the State Decision.

explicated by the Court. *Helicopteros*, 466 U.S. at 413. *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (rejecting an assertion of jurisdiction by the Supreme Court of Oklahoma where minimum contacts did not exist "so as to permit Oklahoma courts to exercise jurisdiction consistently with due process under [its] long arm statute"); *Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, S.R.L.*, 264 F.3d 32, 37 (2d Cir. 2001) (question of personal jurisdiction requires a "two-part analysis, looking first to the state's long-arm statute and then analyzing whether jurisdiction comports with federal due process").

The question of whether a Constitutional right has been waived is likewise not to be decided under state law. "The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards." *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Indeed, waiver of a Constitutional right is exclusively a question of federal law. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). And under federal law, a waiver of a Constitutionally guaranteed right must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

It is a fundamental principle of judicial construction that courts indulge every reasonable presumption against waiver of Constitutional rights. *See Fuentes v. Shevin*, 407 U.S. 67, 95, *reh'g denied*, 409 U.S. 902 (1972) (In "civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver'" of procedural due process rights) (citations omitted); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) ("Courts indulge every reasonable presumption against waiver of fundamental constitutional rights") (citation and quotations omitted).

Given the overwhelming law cited above which holds that a post-judgment appearance cannot retroactively validate jurisdiction, it cannot be held that Petitioners voluntarily and knowingly relinquished their due process

defense to jurisdiction by the Post-Judgment Application.[4] The fact that the original proceedings had already been concluded when the Post-Judgment Application was filed further emphasizes that no waiver was intended.

In short, there are no facts or law to indicate that Petitioners should have thought that they were relinquishing their due process right to attack the English Judgments as void for lack of jurisdiction when they made the Post-Judgment Application in England. In such a context, no waiver can be presumed. *See Johnson*, 304 U.S. at 464; *College Sav. Bank*, 527 U.S. at 682.

II. The English Assertion Of Jurisdiction Did Not Comport With Our Due Process Standards

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *International Shoe Co.*, 326 U.S. at 319).

The New York courts recognized $300 million judgments issued by a foreign country despite Petitioners' glaring lack of meaningful contacts with that country. The justification offered for recognizing this exercise of jurisdiction (other than abrogating the defense altogether) was a theory of conspiracy, or co-conspirator, jurisdiction. Appendix B at 38a-42a.

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4. Indeed, not even Respondents interpreted the Post-Judgment Application as a waiver. Petitioners brought their motion to vacate in 2001, while the appeal was still pending before the Appellate Division. Respondents made no submission to that court on this issue. In July 2002, after the Appellate Division affirmed summary judgment, the Court of Appeals directed the parties to submit argument on whether an appeal as of right should be granted due to the presence of a Constitutional question. Petitioners alleged that their due process defense of lack of jurisdiction was such Constitutional grounds, and Respondents did not argue waiver. It was not until February 2003 that Respondents first presented a waiver theory, offering the Court of Appeals an alternative to answering the thorny questions of conspiracy jurisdiction that were posed by the lower court decisions.

This theory, vague in concept and haphazardly applied, does not pass Constitutional muster.

A. Due Process Standards

There are two Constitutional inquiries to determine whether a court possesses personal jurisdiction: (1) does the non-resident defendant have minimum contacts with the forum; and (2) does maintenance of the suit against the non-resident defendant offend traditional notions of fair play and substantial justice. *See International Shoe Co.*, 326 U.S. at 316; *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987).

In expanding on the first inquiry, the Court stated that "minimum contacts must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Id.* at 109 (quoting *Burger King Corp.*, 471 U.S. at 475).

Minimum contacts generally fall into two categories. If the defendant has "continuous and systematic" contacts with the forum state, then general jurisdiction exists for any cause of action. *Helicopteros*, 466 U.S. at 414 n.9. General jurisdiction is not even alleged in this case.

Specific jurisdiction is the alternative test for minimum contacts, and it requires sufficient connections between the defendant, the forum and the cause of action. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984); *Shaffer*, 433 U.S. at 204; *Helicopteros*, 466 U.S. at 414 n.8; *World-Wide Volkswagen*, 444 U.S. at 295; *Calder v. Jones*, 465 U.S. 783 (1984); *Burger King*, 471 U.S. at 474.

In the second Constitutional inquiry, which is grounds for dismissal even if minimum contacts are found, the reasonableness of jurisdiction is judged by weighing the interests of the parties, forum, justice system and larger society. *See Asahi*, 480 U.S. at 113; *World-Wide Volkswagen*, 444 U.S. at 292.

B. "Conspiracy Jurisdiction" Based On The Domicile Of An Alleged Conspirator Does Not Satisfy Minimum Contacts

As the New York Appellate Division held, Respondents "rely upon the concept of co-conspirator jurisdiction to provide the basis for England's exercise of jurisdiction." Appendix B at 38a. The court went on to hold that "[a]pplication of this concept requires a showing that [Petitioners] were part of a conspiracy, at least part of which took place within the jurisdiction." *Id.* The only connection with England noted by the Appellate Division, or any other court, is that one alleged co-conspirator had a domicile in England. *See* Appendix A at 3a. This is sufficient contact for exercise of jurisdiction under English law. *Id.* However, such a broad exercise of conspiracy jurisdiction is patently unconstitutional under our Due Process Clause.

The Court held in *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) that "the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction." *See also Calder*, 465 U.S. 783 (same).

At least two state high courts have interpreted the holding of *Rush* to preclude conspiracy jurisdiction altogether. *See National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769 (Tex. 1995) and *Schwartz v. Frankenhoff*, 733 A.2d 74, 80 (Vt. 1999) (noting that the Court "has [] not decided whether participation in a conspiracy, without other contacts with a jurisdiction, is sufficient to meet due process requirements for personal jurisdiction. Its decisions strongly suggest, however, that conspiracy participation is not enough").

Courts have uniformly held that the exercise of jurisdiction over a party based solely on having jurisdiction over an alleged co-conspirator is not sufficient to show minimum contacts. *See Bamford v. Hobbs*, 569 F. Supp. 160, 169 (S.D. Tex. 1983) ("no court has conferred jurisdiction over an alleged conspirator merely because jurisdiction exists

as to a fellow alleged conspirator") (citing 4 Wright and Miller, *Federal Practice and Procedure* § 1069, at 52 (Supp. 1981)). This Court's decision in *Hanson v. Denckla*, 357 U.S. 235, 253, *reh'g denied*, 358 U.S. 858 (1958) appears to require, at a minimum, that relevant acts not only occur in the forum, but that such acts not be "unilateral activity" of an alleged conspirator. In other words, the non-resident defendant must have participated somehow in the acts. *Id.* ("The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State.")

The federal circuit courts and state high courts are in drastic conflict with each other as to the limits of conspiracy jurisdiction. The Ninth Circuit has flatly rejected the theory, stating in *Chirila v. Conforte*, 47 Fed. Appx. 838, 842-43 (9th Cir. 2002) that:

> There is a great deal of doubt surrounding the legitimacy of this conspiracy theory of personal jurisdiction. Although it has been accepted by some courts, *see, e.g., McLaughlin v. Copeland*, 435 F. Supp. 513, 529-533 (D. Md. 1977) (reviewing the history of and applying the theory), others have rejected it, *see, e.g., Gutierrez v. Givens*, 1 F. Supp. 2d 1077, 1083 n.1 (S.D. Cal. 1998) (rejecting the theory), *Kipperman v. McCone*, 422 F. Supp. 860, 873 n.14 (N.D. Cal. 1976) (same). The use of the theory has been criticized by commentators, *see, e.g.*, Ann Althouse, *"The Use of Conspiracy Theory to Establish In Personam Jurisdiction,"* 52 Fordham L. Rev. 234 (1983), and we have rejected an analogous theory, *see Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 492 (9th Cir.1979) (rejecting a conspiracy theory of venue).

Furthermore, this "analogous theory" noted by the Ninth Circuit in *Chirila*, namely using a conspiracy theory to establish venue, was soundly rejected by this Court in *Bankers Life and Casualty v. Holland*, 346 U.S. 379, 384 (1953), where

it was held to be a "frivolous albeit ingenious" argument. *Id.* The Court's holding in *Bankers Life* has been interpreted by courts to stand for the proposition that conspiracy allegations cannot form the basis for personal jurisdiction. *See, e.g., Coopers & Lybrand v. Cocklereece*, 276 S.E.2d 845, 850 (Ga. Ct. App. 1981). The flat rejection of conspiracy jurisdiction by the Ninth Circuit is also shared by certain state high courts. *See, e.g., National Indus. Sand Ass'n*, 897 S.W.2d 769; *Schwartz*, 733 A.2d 74.

Other federal and state courts recognize conspiracy jurisdiction, although none to the extreme that was exercised in this case. Moreover, those courts that do exercise conspiracy jurisdiction do so in countless conflicting ways. The Second Circuit has held that conspiracy jurisdiction may be exercised where one alleged conspirator commits an act within the forum state that is "for the benefit of, with the knowledge and consent of, and under some control by, the nonresident principal." *Grove Press, Inc., v. Angelton*, 649 F.2d 121, 122 (2d Cir. 1981). The Eleventh Circuit has instead cited to the application of a five-part test for conspiracy jurisdiction, involving: (1) the existence of conspiracy; (2) the defendant's membership in the conspiracy; (3) the occurrence of a substantial act or effect in furtherance of conspiracy in the forum state; (4) the defendant's actual or constructive knowledge of the act or effect in the forum state; and (5) the conspiracy conduct's direct or foreseeable cause of the act or effect. *Posner v. Essex Ins. Co.*, 178 F.3d 1209 (11th Cir. 1999). *See also Hercules Inc. v. Leu Trust & Banking Ltd.*, 611 A.2d 476, 482-85 (Del. 1992), *cert. dismissed*, 507 U.S. 1025 (1993).

The Seventh Circuit holds, by contrast, that conspiracy jurisdiction requires only "an actionable conspiracy and a substantial act in furtherance of the conspiracy performed in the forum state." *Textor v. Board of Regents*, 711 F.2d 1387, 1392-93 (7th Cir. 1983). The Federal Circuit, while refusing to adopt a clear holding, has made reference to a three-part test involving an "injury-causing act."

Edmond v. United States Postal Serv. Gen. Counsel, 949 F.2d 415, 425 (D.C. Cir. 1991)

> [w]e do not at this stage attempt to address the limits on the use of conspiracy theory to establish personal jurisdiction. Whatever those limits, it is an abuse of discretion to deny jurisdictional discovery where the plaintiff has specifically alleged: (1) the existence of a conspiracy, (2) the nonresident's participation, and (3) an injury-causing act of the conspiracy within the forum's boundaries.

Compare Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1031 (D.C. Cir. 1997) (making reference to absence of "personal jurisdiction under a conspiracy theory" and dismissing for failure to show minimum contacts). The Sixth Circuit has discussed the issue, but has not made a holding in any one direction. *See Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1237 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981) (after discussion of history of theory, ruled on other grounds, holding that "we need neither adopt nor reject the 'conspiracy theory' of *in personam* jurisdiction as a general principle of law in this circuit"). *See generally*, Stuart M. Riback, *"The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction,"* 84 Colum. L. Rev. 506 (1984); A. Althouse, *"The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis,"* 52 Ford. L. Rev. 234 (1983).

In *World-Wide Volkswagen*, the Court emphasized that past holdings assess the reasonableness of jurisdiction in the federal context not only because of the fairness concerns embodied in the Due Process Clause, but also because of the need for the "orderly administration of the laws." 444 U.S. at 293 (citing and quoting *International Shoe Co.*, 326 U.S. at 317, 319).

This imperative to administer Constitutional rights in an orderly fashion must be applied to the concept of conspiracy

jurisdiction. There is tremendous confusion and conflict regarding this concept. This case is a perfect example, as the New York courts recognized a foreign judgment by using the concept of conspiracy jurisdiction despite a complete lack of precedent in any remotely similar situation. The precedent cited herein indicates that conspiracy jurisdiction, at least in the broad manner that it was exercised by the New York courts in this case, does not pass Constitutional muster.[5] Petitioners respectfully request that the Court grant this petition and clarify the limits on this rapidly growing, yet still unpredictable, jurisdictional basis.

III. Due Process Standards For Exercising Personal Jurisdiction Cannot Be Applied Differently As Between Domestic Judgments And Foreign Judgments For Which Enforcement Is Sought In State Courts

In ruling that there had been a submission to the jurisdiction of England by the making of the application to set aside the $300 million default judgment and to contest the claims on the merits, the New York court perpetuated a concept of gamesmanship in the law pertaining to foreign judgments which New York, the Federal courts and other states have long abjured with respect to their own domestic judgments.

To put it directly: if a defendant in New York believes the court lacks personal jurisdiction, the defendant makes a

5. The exercise of jurisdiction over Petitioners also fails the due process inquiry into reasonableness, analyzed using the five-part test set forth by the Court in *Asahi*, which considers: (i) the burden on defendant; (ii) the interests of the forum State; (iii) plaintiff's interest in obtaining relief; (iv) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (v) the shared interest of the several States in furthering fundamental substantive social policies. 480 U.S. at 113. Where, as here, *none* of the parties, witnesses or evidence relating to Respondents' claims resides in England, and no acts or effects relating to the conspiracy occurred in England, the exercise of jurisdiction would be unconstitutionally unreasonable. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573-75 (2d Cir.), *cert denied*, 519 U.S. 1006 (1996); *Asahi*, 480 U.S. at 114; *Keeton*, 465 U.S. at 778; *Caruth v. International Psychoanalytical Ass'n*, 59 F.3d 126, 129 (9th Cir. 1995).

motion to dismiss. If the defendant loses the motion, the defendant may then contest the case on the merits and if the defendant loses on the merits, the defendant can appeal the propriety of the denial of the motion to dismiss and the substantive judgment. If appellate courts conclude that there had been no personal jurisdiction, the judgment against the defendant is dismissed.

No New York or Federal court would contend that by trying the case on the merits after moving to dismiss, the defendant had waived the Constitutional requirement of personal jurisdiction. Going forward with a trial on the merits, after denial of a motion to dismiss for lack of jurisdiction, would not be deemed a voluntary submission.

Contrast this treatment of a defendant by a New York court involving a domestic judgment with the treatment meted out to a defendant by a New York court in a situation involving the recognition and enforcement of a foreign country judgment. Here, the New York court, although well aware that Petitioners had carried their only available jurisdictional arguments to England's highest court, nevertheless held that any participation on the merits (having viewed the post-judgment application as tantamount to participation on the merits) constitutes a submission to the jurisdiction. This is diametrically opposite to what happens domestically. But there is no Constitutionally available reason why such an anomalous and invidious result should be the law in one instance and not in the other.

If participation on the merits after signifying a jurisdictional objection is not a submission to the jurisdiction in a domestic case, why should it constitute such submission in enforcing foreign judgments? Why should an American brought before a foreign court have to stake everything on its belief in the lack of personal jurisdiction by defaulting while his fellow American in a domestic challenge to jurisdiction is not required to default in order to preserve the jurisdictional point? Asking the question exposes the lack of due process afforded to an American defendant opposing recognition. An American sued in a foreign country, seeking

to avoid jurisdiction but having no vehicle for such an attack in that country, should be just as deserving of the solicitude of an American court in a recognition proceeding as its domestic counterpart who is able to make a motion to dismiss, thereby testing its belief in a lack of personal jurisdiction, and still defend the case on the merits without suffering the consequences of the foreign judgment defendant being deemed to have submitted to jurisdiction by going forward on the merits.

The New York court's position is an anachronism, a relation back to the sporting theory of justice. This discriminatory state action does not accord with established Constitutional principles. In *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) this court states that, "[t]he Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodies and emphasized that ideal." The unequal, unfair and unjustifiable treatment accorded defendants by new York in the instant recognition proceedings, is the very antithesis of equal justice and violates the Due Process Clause.

The New York decision determines whether a waiver of Constitutional rights has occurred not based upon the acts and knowledge of the party alleged to have waived the right, but on the type of court - foreign or domestic - in which the judgment was rendered. This is in conflict with due process protections as well as principles of waiver. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937) ("[w]e do not presume acquiescence in the loss of fundamental rights."); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) ("in the civil no less than the criminal area, courts indulge 'every reasonable presumption against waiver'").

CONCLUSION

For all of the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE COURT OF APPEALS OF NEW YORK DATED MAY 8, 2003

COURT OF APPEALS OF NEW YORK

CIBC MELLON TRUST COMPANY, as Trustee of Chrysler Canada, Ltd.'s Benefits Plan and Others, et al.,

Respondents,

v.

MORA HOTEL CORPORATION N.V. et al.,

Appellants.

May 8, 2003

READ, J.

Defendants here appeal from an order of the Appellate Division, which, among other things, affirmed Supreme Court's order and judgment recognizing and docketing certain judgments entered against them by the English High Court of Justice, Chancery Division, pursuant to New York's version of the Uniform Foreign Country Money-Judgments Recognition Act (CPLR Article 53). For the reasons that follow, we conclude that the English judgments at issue satisfy the statutory prerequisites for recognition.

Appendix A

I.

In 1992, Castor Holdings Ltd., a Canadian real estate and financial investment company, declared bankruptcy. Plaintiffs CIBC Mellon Trust Company, as trustee of several pension and other benefit funds, and Daimler Chrysler Canada, Inc. had lost millions of dollars in investments in Castor. In May 1996, plaintiffs commenced legal proceedings in England in the High Court, alleging that they had been duped into making these investments by what amounted to a massive, multinational fraud. The suit named Wolfgang Otto Stolzenberg, the president, CEO and chairman of Castor, as the primary defendant accused of masterminding the fraud.

Marco Gambazzi, a Swiss attorney, was also individually named as a defendant. Gambazzi owned, in whole or in part, and controlled Mora Hotel Corporation N.V. and Chascona N.V.,[1] which were among the numerous corporations eventually named as defendants in the English proceedings. Plaintiffs initially asserted only a "tracing" claim against Mora for receipt of funds for no consideration, which were traceable to the alleged fraud. When plaintiffs added a claim of conspiracy against Mora in January 1999, they joined Chascona as a coconspirator.

Mora is the ground lessee and operator of the Gorham Hotel, located in midtown Manhattan, and Chascona is the fee owner of the property. They are both Netherlands Antilles corporations authorized to do business in New York. The Gorham Hotel is apparently their sole asset.

1. Gambazzi had also served as a director of Castor, a managing director of Castor's principal lending subsidiaries and an officer or director of a number of other Castor subsidiaries.

Appendix A

Plaintiffs made two kinds of ex parte applications to the High Court. The first sought leave to serve various nonresident defendants, including Mora (and later, Chascona), as "necessary or proper" parties. This rule (*see* Rules 6.20; 6.21 of Civil Procedure Rules [of England]) allows out-of-the-jurisdiction service on such a party when the liability of the defendants, either jointly or individually, depends upon a single investigation (*see Massey v Heynes*, 21 Q.B.D. 330 [CA 1888]). In order for the High Court to exercise such "necessary or proper" jurisdiction, however, at least one defendant — in this instance, Stolzenberg — must be an English domiciliary and serve as the base or anchor defendant (*see* Rules 6.20; 6.21). The second kind of ex parte application sought *Mareva* injunctions or orders (*see Mareva Compania Naviera S.A. v International Bulkcarriers S.A.*, 2 Lloyd's Rep 509 [1975]) to freeze defendants' assets on a world-wide basis during the pendency of the English proceedings and to direct certain discovery. The initial *Mareva* order required Mora to provide information and documents relating to the tracing claim and its assets as well as copies of any documents relevant to the proceedings. In support of this application, plaintiffs submitted attorney affidavits and voluminous supporting documentation. After reviewing these materials over nine days, the High Court determined that plaintiffs had made the requisite showing; namely, a "good arguable case."

In March 1997, plaintiffs served Mora in New York with a writ of summons and the *Mareva* order. Mora appeared in the English proceedings for the limited purpose of contesting the High Court's jurisdiction over Stolzenberg, the anchor defendant, on the grounds that he was not domiciled in

England at the time that Mora argued was critical (i.e., when the writ of summons for Stolzenberg was served rather than when it was issued). In May 1997, the High Court rejected Mora's argument and dismissed its application to set aside service of the writ on it; and the Court of Appeal dismissed Mora's appeal in October 1997. Finally, in October 2000, the House of Lords dismissed Mora's appeal from the Court of Appeal. Chascona abandoned its identical jurisdictional challenge following the House of Lords' dismissal of Mora's appeal.

While disputing the High Court's jurisdiction, Mora elected not to comply with the *Mareva* order relating to the tracing claim and several subsequent orders to secure compliance with it. Some of these orders were "unless" orders, which explicitly warned Mora that continued recalcitrance would lead to its debarment or preclusion from defending against the tracing claim and permit plaintiffs to obtain judgment. When Mora failed to take heed, a default judgment was entered against it for roughly $600,000 (U.S.) in February 1999, following a damages assessment hearing.

In July 1999, plaintiffs applied ex parte to increase to $420 million (Can.) the value of Mora's assets covered by the *Mareva* order, and to grant the same freezing relief with respect to Chascona on account of the conspiracy claims pending against them both. Once again, before granting plaintiffs' applications, the High Court examined the evidence to determine whether plaintiffs had established the requisite "good, arguable case."

Appendix A

Thereafter, as a result of their failure to comply with the new *Mareva* and concomitant "unless" orders, both Mora and Chascona were debarred from defending against the main fraudulent conspiracy claims. Plaintiffs applied to the High Court for an assessment of damages, and a hearing was held. In December 1999, default judgments of roughly $330 million (U.S.) were entered in England against both Mora and Chascona on the conspiracy claims.

In May 2000, plaintiffs commenced an action in Supreme Court, seeking recognition of the English judgments pursuant to the Uniform Foreign Country Money-Judgments Recognition Act (CPLR article 53) and New York common law, as well as an attachment of the Gorham Hotel, reportedly worth approximately $30 million. On January 16, 2001, Supreme Court granted plaintiffs summary judgment recognizing and docketing the English judgments; confirmed the attachment; appointed a post-judgment receiver to manage and sell the Gorham Hotel in satisfaction of the English judgments; and denied defendants' cross motion to dismiss the complaint.

The Appellate Division affirmed Supreme Court's order and judgment on May 28, 2002 (296 AD2d 81 [2002]). This appeal pursuant to CPLR 5601(b)(1) followed. The constitutional issues asserted as a basis for our jurisdiction on the appeal are, broadly stated, whether the courts below violated defendants' due process rights by (1) determining that the English courts properly exercised personal jurisdiction over them; and (2) recognizing foreign judgments that were entered on default following defendants' failure to comply with a provisional remedy (the *Mareva* orders) not available in New York.

Appendix A

Subsequent to Supreme Court's decision and order, defendants in 2001 and 2002 applied to the High Court to set aside the default judgments entered against them because of their failure to comply with the "unless" orders, and to allow them to defend the tracing and conspiracy claims on the merits. After a six-day hearing, which took place from December 9-16, 2002, the High Court dismissed defendants' applications on February 3, 2003. Plaintiffs then moved to dismiss this appeal, arguing that defendants' applications to the High Court mooted the asserted constitutional bases. We withheld decision and entertained oral argument on both the motion and the appeal.

II.

New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts (*see e.g. Lazier v Westcott*, 26 NY 146 [1862]; *Dunstan v Higgins*, 138 N.Y. 70 [1893]; *Cowans v Ticonderoga Pulp & Paper Co.*, 246 NY 603 [1927]; *see also Greschler v Greschler*, 51 NY2d 368, 376 [1980]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5301:1, at 540); and in 1970, New York adopted the Unif. Foreign Money-Judgments Recognition Act (*see* Uniform Foreign Money-Judgments Recognition Act §§ 1-9, 13 ULA 43-80; L 1970, ch 981, §§ 1-2)[2] as CPLR article 53. Article 53 was designed to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments

2. Twenty-nine other states and the District of Columbia have adopted variations of the Uniform Act.

would receive streamlined enforcement here (*see* Judicial Conference Mem in Support, Bill Jacket, L 1970, ch 981, at 4 [reference to pagination of document]; Kulzer, *The Uniform Foreign Money-Judgments Recognition Act*, 13th Ann Jud Conf Rep, 194, 195-196, 226 [1968]).[3]

Article 53 applies to "any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal" (CPLR 5302). Simply put, a foreign country judgment is considered "conclusive between the parties to the extent that it grants or denies recovery of a sum of money" (CPLR 5303) unless

> 1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; [or]
>
> 2. the foreign court did not have personal jurisdiction over the defendant (CPLR 5304[a][1], [2]).

Moreover, "[i]n proceeding under article 53, the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment" (*Lenchyshyn v Pelko Elec.*, 281 AD2d 42, 49 [4th Dept 2001]).

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3. *See also* Kulzer, *Recognition of Foreign Country Judgments in New York: The Uniform Foreign Money-Judgment Act*, 18 Buf L Rev 1 (1968).

Appendix A

On this appeal, defendants direct their principal fire related to CPLR 5304(a)(1) at the High Court's use of *Mareva* orders. While we have expressed concern regarding the power and potential commercial disruption of *Mareva* orders (*see Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 550-551 [2000]), the use of this device, standing alone, does not render the English *system* as a whole incompatible with our notions of due process (*see, e.g. Guinness PLC v Ward*, 955 F2d 875, 900 [4th Cir 1992]). In short, CPLR 5304(a)(1) does not demand that the foreign tribunal's procedures exactly match those of New York. Rather, the statute is satisfied if the foreign court's procedures are "compatible with the requirements of due process of law" (*id.* at 882). Moreover, "[c]onsidering that our own jurisprudence is based on England's, a defendant sued on an English judgment will rarely be in a position to defeat it with such a showing" (Siegel, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5304:1, 2003 Supp Pamph, at 65; *see also Society of Lloyd's v Ashenden*, 233 F3d 473, 476 [7th Cir 2000] ["Any suggestion that [England's] system of courts 'does not provide impartial tribunals or procedures compatible with the requirements of due process of law' borders on the risible"]).

In summary, the relevant inquiry under CPLR 5304(a)(1) is the overall fairness of England's legal "system," which is beyond dispute (*see Society of Lloyd's v Grace*, 278 AD2d 169 [1st Dept 2000]; *Society of Lloyd's v Ashenden*, *supra*; *compare Bridgeway Corp. v Citibank*, 201 F3d 134 [2d Cir 2000] [fairness of Liberian courts]). Indeed, defendants were given ample notice and numerous opportunities to present their defense in England; they simply elected to forego these

opportunities (apparently against the advice of their English attorneys) for strategic reasons.

Turning next to CPLR 5304(a)(2), the question is whether the English courts had jurisdiction over defendants. Before reaching this question, however, we must consider the merits of plaintiffs' motion to dismiss. Plaintiffs argue that when defendants applied to the High Court, seeking relief from the English judgments and the opportunity to defend on the merits, they "voluntarily appeared in the proceedings" within the meaning of CPLR 5305(a)(2), thus mooting this appeal. While such a voluntary appearance would not, in our view, moot the appeal, it would abrogate the reviewability of defendants' argument that the English judgments are unenforceable in New York because the English courts lacked jurisdiction over them.

Section 5305(a)(2) provides in relevant part that a foreign judgment shall not be denied recognition for lack of personal jurisdiction if "the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure * * * or of contesting the jurisdiction of the court over him" (CPLR 5305[a][2]). Plaintiffs contend that defendants' application to the High Court does not fall within either exception, particularly the second; i.e., it was not an appearance "for the purpose * * * of contesting * * * jurisdiction * * * over [them]."

The commentary for CPLR 5305(a)(2) explains that this second exception is restricted to an

> "appearance * * * solely to protest jurisdiction, what New York used to call and some places still

call a "special appearance". *If the judgment debtor did any more than she had to do, however, to preserve her jurisdictional objection in the foreign court, she would thereby have submitted voluntarily to its jurisdiction and forfeited the right to claim an exception for herself under this paragraph*" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5305:1, at 555-556 [emphasis supplied]).

Federal courts applying New York law have, in fact, interpreted CPLR 5305(a)(2) to foreclose a defendant from contesting a foreign judgment for lack of personal jurisdiction once the defendant has done anything more than it had to do to preserve its jurisdictional objection (*see S.C. Chimexim S.A. v Velco Enters., Ltd.*, 36 F Supp 2d 206, 215 [SDNY 1999]; *Nippon Emo-Trans Co. Ltd. v Emo-Trans Inc.*, 744 F Supp. 1215, 1222-1226 [EDNY 1990]).

In *S.C. Chimexim S.A.*, a Romanian plaintiff sued an American corporate defendant with its principal place of business in New York for an alleged breach of contract in Romania. The defendant failed to appear and the Romanian tribunal, thereafter, entered judgment for approximately $200,000. The defendant appealed from the Romanian judgment, raising multiple grounds going to both the merits and personal jurisdiction. In the federal action to enforce the Romanian judgment, the court held that the defendant had made a voluntary appearance pursuant to CPLR 5305(a)(2) and was, thus, precluded from contesting personal jurisdiction (*S.C. Chimexim S.A.* at 215).

Appendix A

In *Nippon Emo-Trans Co., Ltd.*, a Japanese judgment creditor sought an order confirming attachment of a New York company's assets in order to satisfy the judgment it had obtained against the company in Japan. The court determined that the New York company's appearance in the Japanese action to defend on the merits after losing its jurisdictional challenge was a voluntary appearance within the meaning of CPLR 5305(a)(2) (*Nippon Emo-Trans Co. Ltd.* at 1222-1226).

The *Nippon* court reasoned that the traditional conceptual differences between "general" and "special" appearances prevailing at the time CPLR article 53 was adopted formed the "conceptual underpinnings" of section 5305(a)(2) (*id.* at 1224-1225). The court also relied upon a section of the Restatement of the Conflict of Laws, which states that "[a] general appearance is one where the defendant either enters an appearance in an action without limiting the purpose for which he appears or where he asks for relief which the court may give only if it has jurisdiction over him" (*id.* quoting Restatement [Second] of Conflict of Laws § 33, Comment d). Included in this category are those instances where a defendant "makes a motion raising a question as to the merits of the plaintiff's claim even though the defendant shows that he does not intend thereby to submit himself to the jurisdiction of the court" (*id.*).

While New York no longer distinguishes between a general and special appearance (*see* CPLR 320), we agree with the *Nippon* court that the language and structure of CPLR 5305(a)(2) have retained the traditional distinction for purposes of recognition actions. Accordingly, the pertinent question here is whether defendants' applications to the High Court amounted to a voluntary appearance within the meaning of CPLR 5305(a)(2).

Appendix A

The "skeletal argument" submitted by defendants on their applications to set aside the English judgments and the High Court's decision leave no room for doubt that defendants were arguing the merits of the conspiracy claims in the English proceedings. They made arguments and presented proof in an attempt to persuade the High Court that their reasons for disobeying the *Mareva* and "unless" orders were reasonable. Significantly, "[c]onsiderable time was spent, on the hearing of the Applications, on the issue of the legal merits of the claims against Mora and Chascona" (*CIBC Mellon Trust Co. v Stolzenberg*, 2003 WL 117093 at ¶ 46). Exploration of the legal merits of the conspiracy claims in particular "took up much of the hearing" (*id.* at ¶ 66).[4] Defendants did not preserve any objection to the High Court's jurisdiction over them for purposes of this recognition proceeding. Indeed, they went so far at oral argument as to suggest that if they had successfully vacated the English judgments and unsuccessfully defended on the merits, they still could have contested personal jurisdiction in a future New York recognition proceeding.

We disagree. When defendants applied to the High Court to set aside the English judgments and to defend on the merits, they did more than they had to do to preserve a jurisdictional objection — which was, in any event, foreclosed to them in

4. The High Court Judge, The Honourable Mr. Justice Etherton, remarked on both the volume of materials submitted and the length of the proceedings: "There were more than sixty lever-arch files [binders] placed before me, for the purposes of the Applications. The hearing before me lasted six days, and undoubtedly would have lasted considerably longer" had defendants' counsel not had another engagement and if the court had allowed plaintiffs to continue in proving the merits of their conspiracy claims (*CIBC Mellon Trust Co. v Stolzenberg*, *supra* at ¶ 79).

England by the House of Lords' decision — and so they voluntarily appeared in the foreign proceeding within the meaning of CPLR 5305(a)(2).

We note that CPLR 5305(a)(2) does not on its face distinguish between voluntary appearances taking place in the foreign proceeding before or after judgment; and the two Federal cases discussed above each involved post-judgment appearances by the judgment-debtors. The Restatement of the Conflict of Laws likewise makes no pre- or post-judgment distinction, stating that a defendant may be deemed to have made an appearance in an action and, therefore, to have submitted to a court's jurisdiction, by, among other things, "taking steps in the action *after judgment either in the trial court or in an appellate court*" (Restatement [Second] of Conflict of Laws, § 33, Comment b [emphasis supplied]; *see* Restatement [Third] of Foreign Relations Law, § 421[3] [stating that "[a] defense of lack of jurisdiction is generally waived by any appearance * * * if the appearance is for a purpose that does not include a challenge to the exercise of jurisdiction"]).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

* * *

Order affirmed, with costs. Opinion by Judge Read. Judges Smith, Ciparick, Wesley, Rosenblatt and Graffeo concur. Chief Judge Kaye took no part.

Decided May 8, 2003

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DATED MAY 28, 2002

SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT, NEW YORK

CIBC MELLON TRUST COMPANY, etc., et al.,

Plaintiffs-Respondents,

v.

MORA HOTEL CORPORATION N.V., et al.,

Defendants-Appellants.

May 28, 2002.

SAXE, J.

This appeal requires this Court to consider what circumstances are sufficient to grant recognition and enforcement of a money judgment issued by an English court, where the defendants are Netherlands corporations doing business in New York that maintained no presence in England and appeared only for the purpose of contesting personal jurisdiction.

FACTS

The legal claims that form the basis for the judgments at issue here relate to the financial collapse of Castor Holdings Ltd., a Canadian real estate and financial investment company

that declared bankruptcy in 1992. Plaintiff CIBC Mellon Trust Company, acting as the trustee of several trust funds, and plaintiff DaimlerChrysler Canada Inc. both invested, and lost, millions of dollars in Castor Holdings investments. They commenced legal proceedings in the English High Court of Justice, Chancery Division, alleging that they had been defrauded into these investments in what amounted to a massive, multinational fraud. Named as primary defendant in the English proceeding was Wolfgang Otto Stolzenberg, the president, chief executive officer and chairman of Castor Holdings, who is alleged to have orchestrated the fraud.[1]

In addition to three other individual defendants named in the English proceeding, plaintiffs ultimately named 47 corporate defendants, including the two defendants in the present proceeding, Mora Hotel Corporation N.V. ("Mora") and Chascona N.V. ("Chascona"). Mora is the ground lessee and operator of the Hotel Gorham, located at 136 West 55th Street in Manhattan, and Chascona is the fee owner of the property; they are both Netherlands Antilles corporations authorized to do business in New York. One of the named individual defendants in the English action, Marco Gambazzi, is a Swiss attorney who owns and controls defendants Chascona and Mora Hotel Corporation; he also served as a director of Castor Holdings and managing director of Castor's principal lending subsidiaries, CH International Finance NV, as well as serving as officer or director of a number of other Castor subsidiaries.

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1. Indeed, in April 2000, Stolzenberg was indicted in Canada for 41 counts of fraud relating to Castor's collapse.

Appendix B

When the action was commenced in England in 1996, the claims were initially made against a total of 37 defendants, including defendant Mora Hotel Corporation. However, while the claims against Stolzenberg, Gambazzi, the other two individual defendants, and Castor Holdings and its subsidiaries were, from the outset, based upon a claim of a fraudulent conspiracy, the claim as against Mora Hotel was initially much more limited. Plaintiffs merely interposed a "tracing" claim, analogous to a claim for a constructive trust, in which they alleged that Mora had received funds for no consideration that could be traced to investments made by plaintiffs based upon the alleged fraud by Castor, which claims amounted to (Can.) $195,653, (Can.) $151,610 and (US) $51,662.

When plaintiffs amended their claim in 1999, following receipt of certain discovery, defendant Chascona N.V. was added as a defendant, and the claims against it as well as new claims against Mora encompassed the overall fraud as well as tracing claims. The damages then sought against them, like those against Stolzenberg and the other defendants, were over $300 million.

English Court Procedures

To commence the English proceeding, plaintiffs made two ex parte applications to the English High Court in June of 1996. One sought leave to serve various non-resident defendants, some of whom, including Mora, were sought as

necessary or proper parties,[2] some as citizens of signatories to the Lugano Convention.[3] The second application sought ex parte injunctive relief, termed a "Mareva" injunction, by which the defendants' assets would be frozen during the pendency of the proceedings and certain discovery directed.

The basis of the assertion of jurisdiction by the English High Court over Mora, and later over Chascona, namely, that they were "necessary or proper parties," is founded upon an English practice rule (*see*, Rules of the Supreme Court of England Order 11 Rule 1[1][c]). This rule permits the court to grant a plaintiff leave to serve process on out-of-jurisdiction defendants in a multi-defendant case as long as one "base" or "anchor" defendant is a domiciliary of England, and the out-of-jurisdiction defendants are either necessary or proper parties. A "proper" party is one who, had he been in the country, could have been joined as a proper party to the proceeding (*see*, Dicey & Morris, The Conflict of Laws [13th ed.], at 316); a "necessary" party is "any person . . . whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon" (*see*, RSC

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2. The decision of the motion court referred to the Lugano Convention instead of "necessary or proper party" jurisdiction as the basis of the English court's assertion of jurisdiction over these defendants; we discuss the basis upon which the English court actually asserted jurisdiction.

3. The Lugano Convention provides for the enforcement of judgments between member states of the European Economic Community and the European Free Trade Association, the latter of which includes Austria, Finland, Iceland, Norway, Sweden and Switzerland.

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Order 15 rule 6[2]; *Barings PLC [in Administration] v Coopers & Lybrand*, English High Court of Justice, Chancery Division, August 2, 1996, Chadwick, J. [unreported]).

In support of their two ex parte applications, plaintiffs submitted attorney affidavits and voluminous supporting documentation, which the court reviewed over a period of nine days. The court determined that plaintiffs had made the requisite showing, namely, a "good, arguable case" for the claims against the defendants.

A Writ of Summons was initially issued August 1, 1996, and leave of court to make Mora a defendant was granted on February 26, 1997. In March of 1997, Mora was served in New York with the Writ and a Mareva order, restraining it from transferring assets and directing certain disclosure. Mora and its owner, Gambazzi, thereupon retained English counsel and appeared for the limited purpose of disputing the court's exercise of personal jurisdiction over them.

In an effort to protect their rights to subsequently challenge the English court's exercise of jurisdiction over them, defendants avoided raising issues that would address the merits of the substantive claims against them, and so did not challenge the determination of the English court that they were necessary or proper parties. Rather, their jurisdictional challenge was limited to the propriety of the assertion of jurisdiction over the base defendant, Stolzenberg, on the ground that he was no longer domiciled in England at the time plaintiffs attempted to serve him with the Writ of Summons.

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Their jurisdictional challenge to the propriety of service was denied in the English High Court. In its ruling, the court acknowledged that although there was evidence that Stolzenberg was domiciled at a London address when the writ was issued on August 1, 1996, he sold that property on August 19, 1996, prior to delivery of process to that location. Nevertheless, it concluded that jurisdiction over the moving defendants was proper. In October of 1997, defendants challenge to this order was rejected, and the order affirmed, in a 48-page opinion. Another appeal ensued, and on October 12, 2000, the House of Lords unanimously affirmed the lower courts, reasoning that jurisdiction over the anchor defendant was proper even if service could not be effectuated on the base defendant until a later date, as long as that defendant was domiciled in England on the date of issuance of the writ. It rejected the suggestion that "necessary or proper party" jurisdiction over out-of-jurisdiction defendants is only permitted if the base defendant was domiciled in England on the date of service of process.

Meanwhile, on the advice of counsel, Mora had declined to comply with the Mareva order, and as a result Mora was "debarred"[4] from defending on the tracing claim. Following a damages assessment hearing, plaintiff obtained judgments against Mora totaling close to $600,000.

In January 1999, plaintiffs applied to the English High Court to include Mora in the conspiracy claim previously asserted against the other defendants, and to add Chascona

4. Black's Law Dictionary, 7th ed., defines debarment as "the act of precluding someone from having or doing something."

as a defendant on the conspiracy claim, pursuant to an Amended Statement of Claim. Once again, the English court was required to examine the evidentiary showing submitted by plaintiffs and determine that a "good arguable case" existed regarding the claims of conspiracy against Mora and Chascona. Upon such conclusion, the court granted leave to add Chascona as a necessary or proper party and to amend the claim against Mora. The order explained that the prior debarment of Mora did not apply to the new conspiracy claim.

Chascona interposed the same jurisdictional defense as that made by Mora, but adjourned it pending the House of Lords ruling on Mora's challenge.

In July 1999, plaintiffs applied ex parte for an order increasing the amount of the restrained assets under the Mareva order against Mora to $420,000,000 (Can.), and extending the same order to Chascona. On this application, too, the English High Court examined the presented evidence to determine whether plaintiffs had established the requisite "good arguable case." Following its review of the plaintiffs' showing, on July 23, 1999, the court granted this application.

Thereafter, as a result of their failure to comply with the new Mareva order, both Mora and Chascona were debarred from defending against the conspiracy claims. In November 1999, plaintiffs applied to the court, on notice to defendants, for an assessment of damages, and a hearing was held. In December 1999, judgments of about $330 million (US) were entered against both Mora and Chascona.

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The New York Proceedings

Plaintiffs, in an effort to recover under the English judgments, undertook to seize defendants' property in New York, which is worth some $30 million. Accordingly, in May of 2000, they commenced the underlying action, asserting a cause of action for recognition and enforcement of the judgments entered in their favor in the English High Court, and seeking in addition a protective attachment. Plaintiffs thereafter requested, and were granted, a temporary fiscal monitor to review the accounts of the Hotel Gorham to ensure that there was no dissipation of assets. They then moved for an order to confirm the attachment, as well as for summary judgment recognizing and docketing as fully enforceable the English court judgments, while defendants cross-moved for dismissal.

Plaintiffs' motions were granted and defendants' request for dismissal denied.

DISCUSSION

The primary focus of defendants' argument on appeal is that the money judgments were obtained in the absence of both personal jurisdiction and due process, and therefore should not be permitted enforcement here. Specifically, defendants assert that neither Mora nor Chascona have or had any contacts with England, and therefore the English court's assertion of personal jurisdiction is incompatible with fundamental principles of our law. They also contend that Mora and Chascona were denied due process of law in the English proceedings, emphasizing the ex parte aspect of the

English procedures to suggest that it was not compatible with basic due process rights.

Determination of the jurisdiction issue turns on the application of Article 53 of the CPLR, New York's enactment of the Uniform Foreign Country Money-Judgments Recognition Act (*see*, CPLR 5309), which concerns the recognition and enforcement of money judgments issued by the courts of foreign countries. Under Article 53, a money judgment issued by the court of a foreign country will be recognized and enforceable in New York State, unless it fits within one of the specific statutory exceptions set forth in CPLR Article 53 (*see*, CPLR 5303, 5304; *Watary Servs. v Law Kin Wah*, 247 AD2d 281, 282).

The two grounds for *mandatory* non-recognition of foreign money judgments, set forth in 5304(a), are that the foreign judgment was

> (1) * * * rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; [or]
>
> (2) the foreign court did not have personal jurisdiction over the defendant.

Defendants rely upon both subsections as grounds for denying enforcement here.

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Due Process

There are few cases in which recognition of a foreign money judgment is denied for lack of due process under the CPLR 5304(a)(1); review of them illustrates the type of circumstances necessary to successfully establish that a judicial system failed to provide procedures compatible with due process of law. In *Bank Melli Iran v Pahlavi*, (58 F3d 1406, 1411-1412, *cert denied* 516 US 989), there was evidence that Iranian trials were highly politicized, that the government did not believe in an independent judiciary, that the judiciary was biased, and that the defendant, the sister of the deposed Shah, could not possibly have gotten a fair trial in Iran. In *Bridgeway Corp. v Citibank* (45 F Supp 2d 276, 287, *affd* 201 F3d 134), there was a showing that the Liberian Constitution had been suspended, that corruption and incompetence in handling of legal cases was prevalent, and that litigants' due process rights were frequently ignored (*see also*, *Choi v Kim*, 50 F3d 244, 249-250; *Banco Minero v Ross*, 106 Tex 522, 172 SW 711, 715).

In contrast, in *S.C. Chimexim S.A. v Velco Enter.*, (36 F Supp 2d 206), the court concluded that the requirements of due process were satisfied by the Romanian judicial system that was newly reformed in 1992, following the country's adoption of a new Constitution in 1991 after the overthrow of the former Communist regime in 1989. Despite studies indicating that Romania's new judicial system was still not strictly following the procedures necessary to implement the basic due process guarantees contained in the new Constitution, and that it "lag[ged] badly behind many of its neighbors in clearly breaking away from the Communist past"

(*id.* at 213 n.6, 214), the court concluded that the evidence regarding Romania's current judicial system sufficiently demonstrated that it is an independent system containing due process guarantees and providing impartial tribunals (*id.* at 214).

The English system of law cannot reasonably be compared with the type of system that fails to provide due process (*see*, *Society of Lloyd's v Ashenden*, 233 F3d 473, 476, and authorities cited therein; *Dynamic Cassette Inter. Ltd. v Mike Lopez & Assocs.*, 923 F Supp 8). Recognizing this, defendants, rather than contending that the English judicial system in general fails to protect litigants' due process rights, take issue with particular aspects of this particular English proceeding, particularly the English court's use of the "Mareva" injunction.

However, since the subsection refers to "a *system* which does not provide impartial tribunals or procedures compatible with the requirements of due process of law" (CPLR 5304[a][1]), it cannot be relied upon to challenge the legal processes employed in a particular litigation on due process grounds. As the Seventh Circuit Court of Appeals explained, discussing the same provision from Illinois' enactment of the Uniform Foreign Money-Judgments Recognition Act,

> The statute, with its reference to 'system,' does not support such a retail approach, which would moreover be inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions—which would in effect give the

judgment creditor a further appeal on the merits.

(*Society of Lloyd's v Ashenden*, 233 F3d 473, 477, *supra.*)

Moreover, it is important to recall that the *Mareva* order is simply a provisional remedy; it does not remove from a defendant title or the power to conduct its ordinary business. Indeed, it bears some similarity to the grant of the provisional remedy of an order of attachment against an out-of-jurisdiction defendant (*see*, CPLR 6201[1]).

Defendants assert that the Mareva injunction has been criticized by the United States Supreme Court, which quoted commentators who characterized the injunction as "the 'nuclear weapon of the law' " (*see*, *Grupo Mexicano de Desarrollo v Alliance Bond Fund*, 527 US 308, 329, quoting Ough & Flenley, The Mareva Injunction and Anton Piller Order: Practice and Precedents xi [2d ed. 1993]). However, while the Court in *Grupo Mexicano* declined to permit injunctive relief as broad as the English Court permits with the Mareva injunction, it never suggested that such a practice would be violative of the due process protections of the Constitution; rather, it merely suggested that such a change in the law's protection for debtors was best left to Congress (*id.*).

Additionally, since defendants exercised their right to seek to vary or discharge the Mareva orders without submitting to jurisdiction, the suggestion that procedures regarding such orders were completely ex parte is inaccurate.

Furthermore, imposition of a money judgment following the taking of a default against a defendant based upon the

defendant's failure to comply with discovery is an accepted procedure in this state, even where the defendant interposed (and lost) a jurisdictional challenge (*see*, *Reynolds Sec., Inc. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 571-72). A defendant in a New York action who failed to comply with interim court orders may properly be subject to a judgment in the full amount sought in the complaint.

Nor have defendants established that any court proceedings took place that were prohibited by a stay. While the appellate court extended Mora's time to respond to the Writ until 14 days after the House of Lords' decision on the appeal of the personal jurisdiction issue, it did not stay all proceedings. Specifically, that extension of Mora's time to respond to the Writ had no effect on the issuance of the Mareva injunction and plaintiffs' right to take action to enforce Mora's obligation to comply with it. Indeed, Mora was debarred, and defaults taken, based not upon a failure to answer the summons, but upon the failure to comply with the Mareva order requiring disclosure prior to the running of Mora's time to respond. The issuance of orders punishing a party for failure to comply with injunctive relief or disclosure orders, even before defendant's time to serve its answer has run, or before it has been determined whether they are amenable to personal jurisdiction (*see*, *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 465), is a procedure sometimes employed in the courts of this state as well (*see*, CPLR 6301, 6311[1], 3106[a]; *Halitzer v Ginsberg*, 80 AD2d 771, 772).

Moreover, the House of Lords' decision was issued on October 12, 2000, causing Mora's time to respond to expire

on October 26, 2000. Mora did nothing within that time period to respond to the summons, nor did it take any action to challenge the ruling that it was in contempt of the Mareva order.

In any event, defendants received the basic requisites of notice and the opportunity to be heard (*see*, *Society of Lloyd's v Grace*, 278 AD2d 169). Their decision not to participate in litigating the merits of the proceeding, in an effort to protect their rights to interpose a collateral challenge to enforcement of a final judgment, cannot form the basis of a claimed denial of due process (*see*, *Ocean Warehousing B.V. v Baron Metals & Alloys, Inc.*, 157 F Supp 2d 245, 251-252).

We perceive no valid due process complaint here based upon the procedures followed.

Personal Jurisdiction

A foreign money judgment may not be granted recognition and enforcement when "the foreign court did not have personal jurisdiction over the defendant" (CPLR 5304[a][2]).

The determination of whether the English court lacked personal jurisdiction over Mora and Chascona involves several interrelated issues.

Initially, before considering the substantive merits of the personal jurisdiction issue, we must first address plaintiffs' contention that inasmuch as defendants actively litigated the

issue of personal jurisdiction in England, the determination by the English court on that issue must be given res judicata effect, precluding its further consideration here. The threshold question is, therefore, whether defendants have the right to de novo review by this Court of the propriety of the English court's assertion of personal jurisdiction.

Res Judicata

In arguing that res judicata must be applied to the English court's determination that personal jurisdiction was proper, plaintiffs rely primarily on cases involving money judgments of sister States rather than cases involving judgments of foreign countries. As to judgments of sister States, the rule is well settled: a defendant who has made a special appearance to challenge the jurisdiction of the sister State's courts, and whose position has been considered and rejected by that court, may not be heard to raise the jurisdictional challenge anew when the plaintiff seeks to enforce the judgment in a second State (*see, Baldwin v Iowa State Traveling Men's Assn.*, 283 US 522).

However, the same rule does not automatically apply to the judgments of foreign countries. As one Federal District Court has noted, "New York courts have consistently distinguished between judgments of sister states, which must be accorded full faith and credit as a matter of constitutional law, and judgments of foreign countries, for which full faith and credit is not constitutionally mandated" (*Nippon Emo-Trans Co. v Emo-Trans, Inc.*, 744 F Supp 1215, 1229, citing *Schoenbrod v Siegler*, 20 NY2d 403, 409 n.3).

Indeed, the Federal District Court in *Nippon* held that "[a] defendant who appears solely for purposes of contesting jurisdiction will not, by such appearance, waive any jurisdictional objection in a subsequent suit to enforce the foreign judgment" (*Nippon Emo-Trans Co. v Emo-Trans, Inc.*, 744 F Supp 1215, 1221). While acknowledging the complicated nature of this issue, that Court went on to state that "As a general rule, any appearance in which a defendant merely challenges the jurisdiction of the foreign court should qualify under the exception found in Section 5305(a)(2), regardless of the basis on which the foreign court upholds its jurisdiction" (*id.* at 1222).

Plaintiffs concede that had defendants defaulted completely rather than appearing before the English court for the limited purpose of challenging its jurisdiction over them, defendants would now have the right to ask this court to examine whether a proper basis existed for the English court's assertion of jurisdiction (*see, e.g., Boorman v Deutsch*, 152 AD2d 48, 54, *lv dismissed* 76 NY2d 889; *Insurance Corp. of Ireland v Compagnie des Bauxites de Guinee*, 456 US 694, 706). However, other than the *Nippon* case, there is no established case law as to whether, where a defendant interposed a limited appearance in the foreign court for the sole purpose of challenging the foreign court's jurisdiction, and loses on that issue, res judicata effect must be given to the foreign court's determination that the exercise of personal jurisdiction is proper.

Review of the bare language of CPLR 5305(a)(2) seems to support the suggestion that a New York court may, following a limited, special appearance, review the issue of

whether the foreign court had personal jurisdiction over a defendant. Since the statute provides that recognition is *not* required where a defendant appeared in the proceedings solely for the purpose of contesting the jurisdiction of the court over him, logic informs us that the propriety of the personal jurisdiction exercised by the foreign court is not absolutely established as a fact following that appearance and unsuccessful challenge.

If the contrary were true, then any time a defendant appeared in a foreign jurisdiction for the limited purpose of challenging jurisdiction, once the foreign court rejected that challenge and issued a money judgment, no further challenge here would be permissible. Since a foreign court's determination that it has personal jurisdiction does not necessarily comport with the prerequisites of this country's Constitution for such a finding, an assertion of jurisdiction by a foreign court should not preclude a challenge here. Such a challenge is not, in fact, a second bite of the apple on the jurisdiction issue.

The discussion contained in the Restatement (Third) of Foreign Relations Law provides a proposed framework for considering this point:

> Even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction in the light of international concepts of jurisdiction to adjudicate.

* * *

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> If the defendant appeared in the foreign court to challenge the jurisdiction of the court and failed to prevail, it is not clear whether such determination will be considered *res judicata* by a court in the United States asked to recognize the resulting judgment.

(§ 482, comment c). The comment goes on to suggest different appropriate degrees of inquiry, depending upon the foreign court's basis for its assertion of jurisdiction. For instance, if the foreign court relied upon a finding of fact that would support an assertion of personal jurisdiction here, that court's determination should be respected, while if the foreign court depended solely upon a legal analysis, we should scrutinize the analysis to determine if the jurisdictional determination accords with our principles (*see*, *id.* at 607).

Plaintiffs point out that in the case of *Fairchild, Arabatzis & Smith, Inc. v Prometco (Produce & Metals) Co.*, the Southern District Court remarked that "by litigating and losing the issue of personal jurisdiction in Britain, [the defendant] has no right to contest the jurisdiction of that court in a collateral action" (470 F Supp 610, 615). However, in that case the defendant had entered what amounted to a voluntary general appearance. Indeed, the Court took particular note that the defendant could have appeared solely for the purpose of challenging jurisdiction without entering an unconditional appearance as it did (*see*, *id.*, at n.5).

Upon consideration of the foregoing, we hold initially that, in this instance, res judicata effect should not be given

to the English court's rejection of defendants' jurisdictional challenge, except to the extent the English court made a factual finding as to how service had been made upon Stolzenberg, and its conclusion that by such service it obtained jurisdiction over the action. Defendants were unable to raise the assertion there that they had no contacts with England, because addressing the merits of whether they were co-conspirators would arguably constitute a defense on the merits of the substantive claim against them, which indeed could have led to the application of CPLR 5305(2) to prevent them from contesting jurisdiction here (*see, S.C. Chimexim S.A. v Velco Ents. Ltd.*, 36 F Supp 2d 206). Consequently, the merits of that court's exercise of personal jurisdiction over Mora and Chascona should be addressed here.

Necessary Proof on the Issue of Personal Jurisdiction

While CPLR Article 53 attempts to avoid the need for extensive analysis by clearly establishing the circumstances under which our courts will and will not recognize and enforce money judgments issued by the courts of foreign countries, the circumstances of this case are not clearly covered by the provisions of that statute.

Specifically, the statute provides that a money judgment issued by a court of a foreign country will *not* be recognized if the foreign court "did not have personal jurisdiction over the defendant" (CPLR 5304[a][2]). However, although CPLR 5305(a) goes on to list six specific circumstances in which a foreign money judgment "shall not be refused recognition for lack of personal jurisdiction," none of those

specifics apply directly to this case. The complete section provides as follows:

> (a) Bases of jurisdiction. The foreign country judgment shall not be refused recognition for lack of personal jurisdiction if:
>
> 1. the defendant was served personally in the foreign state;
>
> 2. the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;
>
> 3. the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
>
> 4. the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;
>
> 5. the defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or

> 6. the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action rising out of such operation.
>
> (b) Other bases of jurisdiction. The courts of this state may recognize other bases of jurisdiction.

None of the six bases for jurisdiction specified in 5305(a) apply here. Indeed, these circumstances fall within the exception contemplated by subdivision (a)(2), specifically, its exception from the jurisdictional predicate based upon a personal appearance in the foreign court, where:

> "2. the defendant voluntarily appeared in the [foreign] proceedings . . . *other than* for the purpose of . . . contesting the jurisdiction of the court over him" [emphasis added].

Although application of this exception does not establish the converse, namely, that personal jurisdiction *must* be lacking where a defendant appeared only for the purpose of contesting jurisdiction, it does mean that defendants' limited appearance in the English court may not *in itself* suffice to establish personal jurisdiction under 5305(a).

Plaintiffs therefore rely upon the catch-all provision of CPLR 5305(b), which broadly provides that "[t]he courts of this state may recognize other bases of jurisdiction." Plaintiffs suggest that the English law's concept of "necessary or proper party" jurisdiction should be viewed to constitute such an "other basis of jurisdiction" as is covered by

CPLR 5305(b). We are unwilling to accept so broad a proposition.[5] The question is not whether the foreign court properly exercised jurisdiction under its own laws. The use of the term "personal jurisdiction" in CPLR 5305 necessarily contemplates the definition of that term as understood in our jurisprudence.

As Professor Siegel explains in his commentary to CPLR 5305, "New York is free, under subdivision (b), to recognize in respect of the foreign judgment any other jurisdictional basis that New York law finds congenial to its notions of comity. . . . It would seem appropriate for New York to recognize for a foreign judgment, under subdivision (b) of CPLR 5305, *any jurisdictional basis it recognizes in its internal law*" (*see*, *Siegel*, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 5305, at 556 [emphasis added]). That position was adopted by the Fourth Department in *Porisini v Petricca*, (90 AD2d 949, *supra*), where an English money judgment obtained in England against a New York domiciliary was held to be enforceable here based upon the evidentiary submissions before the English court tending to show that the defendant, along with two others, had rented and occupied an apartment in London, but had failed to pay the agreed rent. Since long-arm jurisdiction would have been proper under CPLR 302(a)(4), a "jurisdictional basis . . . recognize[d] in [our] internal law" existed, making the English court's exercise of personal jurisdiction over the defendant proper (90 AD2d at

5. Notably, both parties agree that an English court may exercise "necessary or proper party" jurisdiction over someone outside England regardless of whether that party, or even that cause of action, has any connection to England.

950, *supra* [emphasis added], citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 5305). Similarly, in *Canadian Imperial Bank of Commerce v Saxony Carpet Co.* (899 F Supp 1248, *affd.* 104 F3d 352), the assertion of personal jurisdiction by a Canadian court in a collection action on an account receivable was held to have been proper where a New York business had ordered carpets from a Canadian manufacturer. Although the underlying negotiations and transactions took place in New York, the court held that long-arm jurisdiction would have been proper under CPLR 302(a)(1), because a "clear nexus existed between business transacted by the defendant and the cause of action" where the court specified that "[t]o be subject to in personam jurisdiction in a foreign court, a defendant must have had certain 'minimum contacts' with the forum state" (*id.* at 1252-1253, citing *Ackermann v Levine*, 788 F2d 830, 838; *see also*, *Soloman Ltd. v Biederman & Co.*, 177 AD2d 350, 351).

Therefore, in order to recognize and enforce the money judgments issued by the English High Court against defendants, plaintiffs had to show that based upon the evidentiary materials presented to the English court, the law of this State would permit the exercise of personal jurisdiction over defendants (*see*, CPLR 302; *International Shoe Co. v Washington*, 326 US 310, 316). We turn to the submissions contained in the record to evaluate this issue.

First, however, it must be established which party has the burden of proof, and what that burden is. Plaintiffs assert that it is defendants' burden to demonstrate that the foreign court lacked jurisdiction; they rely upon *Browne v Prentice*

Dry Goods, Inc., (1986 WL 6496, 1986 US Dist LEXIS 24632 [S.D.N.Y. 1986]). However, in that ruling, the District Court relied upon *Overmyer v Eliot Realty* (83 Misc 2d 694), which concerned a judgment of a sister State—which is entitled to full faith and credit—rather than that of a foreign court, which is not.

The weight of case law supports defendants' contention that in order to obtain recognition and enforcement of a foreign country's judgment, its proponent must initially make a prima facie showing of

> (1) a final judgment, conclusive and enforceable where rendered; (2) subject matter jurisdiction; (3) jurisdiction over the parties or the res; and (4) regular proceedings conducted under a system that provides impartial tribunals and procedures compatible with due process

(*see*, *Ackermann v Levine*, 788 F2d 830, 842 n12, *citing Hilton v Guyot*, 159 US 113 and Bishop & Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 Intl L 425, 429-432; *see also*, *Allstate Ins. Co. v Administratia Asigurarilor De Stat*, 962 F Supp 420, 425; *Bridgeway Corp. v Citibank*, 45 F Supp 2d 276, 286, *affd* 201 F3d 134; *Dresdner Bank AG v Haque*, 259, 262-263). We concur with the analysis of these cases.

Review of the record reflects that plaintiffs successfully made the necessary showing, that defendants' conduct, as set forth in materials submitted in the English action, provided the necessary predicate for England's exercise of

personal jurisdiction over them under our Constitutional standards (*see*, *International Shoe Co. v Washington*, 326 US 310, 316).

"Regarding the New York standards pertaining to *in personam* jurisdiction, no simple test exists to determine the propriety of jurisdiction," and " 'proof of one transaction in New York is sufficient to confer jurisdiction [over a nonresident] as long as the activities of the defendant in question were purposeful and there is a substantial relationship between the transaction and the claim asserted' " [cite omitted] (*Canadian Imperial Bank of Commerce v Saxony Carpet Co.*, *supra*, at 1253).

Plaintiffs rely upon the concept of co-conspirator jurisdiction to provide the basis for England's exercise of personal jurisdiction. Application of this concept requires a showing that defendants were part of a conspiracy, at least part of which took place within the jurisdiction (*see*, *Cleft of the Rock Found. v Wilson*, 992 F Supp 574, 581-582; *Dixon v Mack*, 507 F Supp 345, 352).

To illustrate: in *Dixon v Mack*, *supra*, Mitchell Dixon, an adherent of the Unification Church, brought an action in the Southern District of New York, alleging that a conspiracy had deprived him of his civil rights by forcibly abducting him from New York City and driving him to out-of-State locations, first in New Jersey, then in Pennsylvania, where certain of the defendants attempted to "deprogram" him. Defendant William Rick was a Pennsylvania psychiatrist hired by one of the other defendants, after the abduction, to examine Dixon, following which Rick wrote a report

asserting that in his professional opinion, Dixon was "unbalanced" (*id.* at 347). Rick, in moving to dismiss the complaint against him for lack of personal jurisdiction, asserted that his practice was in Pennsylvania and he had no connection to New York, and indeed, that his only act was to examine Dixon, in Pennsylvania, after Dixon's abduction (*id.*). However, the court noted that the allegations of the complaint and some evidentiary materials gave rise to reasonable inferences not only that Rick knew he was participating in an effort to "reprogram" Dixon, but that in the process of joining the conspiracy he subsequently ratified Dixon's abduction (*id.* at 348-349). Consequently, his alleged participation in the conspiracy, including his ratification of an act that took place in New York, was sufficient for a prima facie showing that New York could properly exercise jurisdiction over Rick, although the denial of his motion was without prejudice to renewal at trial (*id.*).

The affidavits and supporting materials provided to the English court were sufficient to have demonstrated, prima facie, that Mora and Chascona, through their owner, Marco Gambazzi, were active participants in the conspiracy alleged in the present case, which conspiracy included acts which took place in England.

Specifically, plaintiffs submitted affidavits explaining that to accomplish the complained-of fraud, the four individual defendants named in the English action, Wolfgang Stolzenberg, Marco Gambazzi, Edwin Bänziger, and Karsten Bodo Von Wersebe, misrepresented Castor Holdings to investors as a bona fide investment company in a healthy financial position, while knowingly manipulating Castor's

business and financial accounts so as to avoid disclosing the true facts. These four individuals, it was explained, used their positions in both Castor subsidiaries and in the companies to which Castor made loans, so as to disguise the actual flow of funds between Castor Holdings and related borrowers, lenders and developers. While Castor's accounts made it appear to investors as an active, growing business consisting of performing loans, new loans and reasonable returns, these individuals disguised the true nature and value of the projects to which loans were made, the purpose for which the funds would be used, and the extent of returns Castor received on the loans.

Plaintiffs' showing tends to support not only the proposition that Gambazzi individually played a significant role in the alleged conspiracy, but also that Gambazzi acted on behalf of Mora and Chascona as well.

There was evidence that both Mora and Chascona were controlled, as well as owned in whole or in part, by individual defendant Marco Gambazzi. In official filings in New York State, Gambazzi described himself as Mora's Chief Executive Officer. He was at least a part-owner of Chascona, and regularly acted on its behalf during the pertinent time period. There was also evidence that on defendants' behalf, Gambazzi retained Wolfgang Stolzengerg, the asserted ringleader of the Castor Holdings fraud scheme, as a management consultant for Mora, Chascona, and the Gorham Hotel, in 1989.

Mora and Chascona, the documents explain, were among the companies that received loans from and gave mortgages to various Castor-related entities. While the financial

arrangements set out in plaintiffs' submissions are too elaborate to discuss in this context, the loans Stolzenberg and/or Gambazzi arranged for Mora and Chascona to receive from Castor fall within the pattern of Castor's typical scheme. For example, on one Castor loan, an arrangement was made for partial refinancing on terms that left Castor unsecured as to a balance of over $2 million. Additionally, interest on loans made to Mora and Chascona was capitalized without the capitalization of interest revealed in Castor's financial statements. By the time of Castor's collapse, a total of approximately $21.35 million was owed by Mora and Chascona on loans from Castor.

Sufficient information was submitted to the English High Court to make a prima facie showing that Gambazzi and/or Stolzenberg, acting on behalf of Mora and Chascona as well as individually, knowingly caused the Castor Group to make loans to Mora and Chascona under the foregoing terms as part of a fraudulent scheme, using funds procured from investors through the use of misrepresentations.

Furthermore, the asserted conspiracy, as it was set forth in the documents plaintiff submitted to the English High Court, had sufficient connection to England to permit a proper exercise of jurisdiction over any knowing co-conspirator, and Mora and Chascona, due to the knowledge they possessed through Gambazzi, were properly included as such.

Inasmuch as plaintiffs made a prima facie showing that defendant corporations, through Marco Gambazzi, were active participants in the conspiracy asserted in the English action, it must be concluded that the English court's exercise

of personal jurisdiction over Mora and Chascona was presumptively proper, unless evidence presented by defendants successfully demonstrated that plaintiffs' prima facie showing was false.

It has all along been defendants' position that (1) the Castor Holdings fraud was perpetrated solely by Stolzenberg, and Gambazzi was merely an outside director who also invested his own and his corporations' money and was therefore as much an innocent victim as Castor's other investors; (2) Mora and Chascona were unconnected with the fraud, having merely received (and largely repaid) a loan from a Castor subsidiary; (3) the fraud took place solely in Canada and the United States. However, their affidavits in support do not succeed in demonstrating that the English court lacked a basis to exercise personal jurisdiction over them (*see*, *Porisini v Petricca*, *supra*). Accordingly, their challenge to the judgments under CPLR 5404(a) must fail.

Other Grounds for Non-Recognition of Foreign Judgments

Defendants raise, for the first time on appeal, several other grounds for declining to enforce the English judgments, derived from subdivision (b) of CPLR 5304, which identifies seven additional grounds upon which to deny recognition of judgments issued by the courts of foreign countries. Defendants contend (1) that the English judgments are "repugnant to the public policy of this state" (CPLR 5304[b][4]) because the Mareva order is incompatible with the American approach to the judiciary's equitable powers; (2) that "the judgment conflicts with another final and conclusive judgment" (CPLR 5304[b][5]), since the public

prosecutor of the Canton of Ticino, Switzerland, after conducting an investigation of a complaint by one of the plaintiffs against Gambazzi and other individuals, decided not to prosecute; (3) that the amounts of the judgments are unconscionable; and (4) that England was a seriously inconvenient forum (CPLR 5304[b][7]). It is undisputed that defendants bear the burden of proving these discretionary grounds for non-recognition.

Defendants' failure to raise these contentions before the motion court constitutes a waiver of them. Moreover, were we to address these contentions on their merits, we would reject them. The exercise of discretion by a Swiss prosecutor in dismissing a charge brought against Marco Gambazzi simply does not constitute the sort of "final and conclusive" judgment contemplated by CPLR 5304(b)(5). Defendants' assertion of inconvenient forum is inapplicable, since CPLR 5304(b)(7) applies to circumstances where "jurisdiction [is] based only on personal service, [and] the foreign court was a seriously inconvenient forum for the trial of the action," because here the English court's jurisdiction over defendants was not based solely upon personal service. Finally, we do not find plaintiffs' recovery of losses from defendants arising out of the asserted fraudulent conspiracy to be in any way repugnant to the public policy of New York.

The motion court's appointment of a temporary fiscal monitor in the context of the interim application was proper, inasmuch as the monitor's duties were limited to review of the Hotel's accounts to ensure its assets were not dissipated or mishandled, and no affirmative control was taken over defendant's assets prior to final judgment.

Appendix B

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Ira Gammerman, J.), entered January 16, 2001, which, *inter alia*, granted plaintiffs' motion for summary judgment recognizing and docketing certain judgments entered in their favor in the High Court of Justice, Chancery Division, London, England, should be affirmed, with costs.

All concur.

ENTERED: MAY 28, 2002

s/ Catherine O'Hague Wolfe
CLERK

APPENDIX C — JUDGMENT AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK DATED JANUARY 5, 2001 AND FILED JANUARY 16, 2001

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 00/602149

IAS Part 27 Case No. 15979

Gammerman, J.

CIBC MELLON TRUST COMPANY, in its capacity as Trustee of the Chrysler Canada Ltd.'s Benefits Plan, the Chrysler Canada Ltd. Master Trust Fund, the Chrysler Canada Ltd. Non-Canadian Master Trust Fund, the Holmes Foundry Division Master Trust Fund, and the Chrysler Canada Ltd. Supplemental Unemployment Benefit Plans, and DAIMLERCHRYSLER CANADA INC.,

Plaintiffs,

- against -

MORA HOTEL CORPORATION N.V. and CHASCONA N.V.,

Defendants.

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JUDGMENT AND ORDER

Plaintiffs, CIBC MELLON TRUST COMPANY and DAIMLERCHRYSLER CANADA INC. ("Plaintiffs"), having commenced this action against defendants, MORA HOTEL CORPORATION N.V. and CHASCONA N.V. ("Defendants"), by Summons and Complaint dated May 18, 2000, seeking recognition, pursuant to the Uniform Foreign Country Money-Judgments Recognition Act [CPLR Article 53] and the common law of the State of New York, of judgments entered in the High Court of Justice, Chancery Division, London, England on February 4, 1999, October 21, 1999 and December 7, 1999 in favor of Plaintiffs and against Defendants (the **"English Judgments"**); and

Plaintiffs having on May 25, 2000 applied for and this Court on May 25, 2000 having made an "Ex Parte Order of Attachment," entered on May 30, 2000, against the New York property of the Defendants (the **"Order of Attachment"**), including, *inter alia*, land and buildings in the County of New York known as the Hotel Gorham and the proceeds therefrom (the **"Hotel"**); and the Sheriff of the City of New York, in the County of New York, having levied upon the Hotel on June 7, 2000 by filing the Order of Attachment with the County Clerk and serving it upon the Defendants; and Plaintiffs having moved on notice to Defendants, by "Order to Show Cause to Confirm Order of Attachment" signed on June 9, 2000 (with supporting papers), for an order confirming the Order of Attachment (the **"Motion to Confirm"**); and

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Plaintiffs having on May 25, 2000 applied *ex parte* for an order temporarily restraining Defendants and their agents from transferring, encumbering or impairing Defendants' interests in any New York property, including the Hotel, and temporarily appointing a special fiscal monitor to oversee the finances of the Hotel; and this Court having on May 25, 2000 granted Plaintiffs' application and signed an "Order to Show Cause, Temporary Restraining Order and Temporary Appointment of Special Fiscal Monitor" (the **"Monitor Order"**), **(A)** bringing on Plaintiffs' motion for (i) a preliminary injunction restraining Defendants and their agents from transferring, encumbering or impairing Defendants' interests in any New York property and (ii) the appointment of a special fiscal monitor to oversee the finances of the Hotel (the **"Monitoring Motion"**), **(B)** restraining Defendants and their agents from transferring, encumbering or impairing Defendants' interests in any New York property, and **(C)** appointing The Honorable Burton S. Sherman to serve as a temporary special fiscal monitor (the **"Special Monitor"**) to oversee the finances of the Hotel; and

Defendants having opposed the Motion to Confirm and the Monitoring Motion; and

This Court having on September 12, 2000 orally continued the Monitor Order; and this Court having by order dated November 8, 2000 further continued the Monitor Order through and after final judgment and enjoined Defendants from making any transfers or payments excepting those to be made in the ordinary course of the Hotel's business; and

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While the Motion to Confirm and the Monitoring Motion were pending, Plaintiffs having moved, by Order to Show cause signed on November 8, 2000 (with supporting papers), **(A)** pursuant to CPLR 3212, for a summary judgment recognizing and docketing the English Judgments as fully enforceable judgments of this Court, **(B)** pursuant to CPLR § 5228, for the appointment of a receiver over Defendants' property, and **(C)** pursuant to CPLR § 5225, for an order directing Defendants to turn over their assets, including the Hotel, to said receiver (the **"Summary Judgment, Receivership and Turnover Motion"**); and

Defendants having opposed the Summary Judgment Motion and having cross-moved for a summary judgment dismissing the Complaint (the **"Motion to Dismiss"**); and

This Court having read and filed the following papers: Plaintiffs' Summons and Complaint (with exhibits), dated May 18, 2000; Order to Show Cause, Temporary Restraining Order and Temporary Appointment of Special Fiscal Monitor, signed May 25, 2000; *Ex Parte* Order of Attachment, signed May 25, 2000; Sealing Order, signed May 22, 2000; Affidavit of James Irvine (with exhibits), sworn to May 17, 2000; Compendium of Exhibits to the James Irvine Affidavit; Affirmation of Leon P. Gold, Esq. (with exhibits), dated May 18, 2000; Affidavit of Thomas P. McConnell (with exhibit, sworn to May 15, 2000; Memorandum of Law in Support of Plaintiffs' Application for an Ex Parte Order of Attachment, and Order to Show Cause for a Preliminary Injunction, with Temporary Restraining Order, and the Appointment of a Special Fiscal Monitor, dated May 18, 2000; Undertaking on Attachment, dated May 24, 2000;

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Undertaking dated June 5, 2000; Order to Show Cause to Confirm Order of Attachment, signed June 9, 2000; Affidavit of David A. Picon, Esq. in Support of Motion by Order to Show Cause for an Order Confirming Order of Attachment (with exhibits), sworn to June 9, 2000; Affidavit of Charles A. Pugh (with exhibits), sworn to September 6, 2000; Compendium of Exhibits to the Charles Pugh Affidavit (two volumes); Reply Affidavit of Mortimer G. Freiheit, Esq. (with exhibits), sworn to September 7, 2000; Reply Affirmation of Bart Schectman, Esq., dated September 11, 2000; Plaintiffs' Reply Memorandum in Further Support of their Motions for a Preliminary Injunction and to Confirm the Attachment and the Appointment of a Special Fiscal Monitor, dated September 11, 2000; Order to Show Cause signed November 8, 2000; Affidavit of Charles A. Pugh (with exhibit), sworn to November 3, 2000; Affirmation of Bart Schectman, Esq. (with exhibits), dated November 6, 2000; Plaintiffs' Memorandum of Law in Support of Their Motions for Summary Judgment and Appointment of a Receiver to Enforce The English Judgments, dated November 6, 2000; Plaintiffs' Reply Memorandum in Further Support of their Motion for Summary Judgment and in Opposition to Defendants' Cross-Motion (with attachments), dated December 1, 2000; Defendants' Answer to the Complaint, dated August 18, 2000; Defendants' Memorandum of Law in Opposition to Plaintiffs' Motions for Preliminary Injunction, Appointment of a Special Fiscal Monitor and to Confirm the Order of Attachment (undated); submitted August 18, 2000; Affidavit of Charles E. Flam, Esq. (with exhibits), sworn to August 16, 2000; Affidavit of David A. Sabo, Esq., sworn to August 18, 2000; Affidavit of Lawrence O. Kamin, Esq. (with exhibits) sworn to August 18, 2000;

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Defendants' Sur-Reply Memorandum of Law in Opposition to Plaintiffs' Motions for a Preliminary Inunction, Appointment of a Special Fiscal Monitor and to Confirm the Ex Parte Order of Attachment (undated), submitted September 28, 2000; Second Affidavit of David A. Sabo, Esq., sworn to September 28, 2000; Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and In Support of Defendants' Cross-Motion for Summary Judgment (undated), submitted November 28, 2000; Second Affidavit of Lawrence O. Kamin, Esq. (with exhibits), sworn to November 28, 2000; and Affidavit of Iain H. Mackie, sworn to November 28, 2000; and

This Court, having considered all of the parties' proofs and the arguments of counsel, finds that there exists no genuine issue of material fact precluding the disposition of the pending motions as a matter of law.

The Order of Attachment was duly issued, levied and served. Grounds for the attachment exist pursuant to CPLR § 6201(5) because plaintiffs' cause of action is based on a foreign judgment, and the attachment should be confirmed pursuant to CPLR § 6212(a) because plaintiffs demonstrated that they were likely to succeed on the merits of their cause of action based on the English Judgments which, as detailed below, qualify for recognition under Article 53 of the CPLR, and the amount of the English Judgments against the Defendants exceeds all known counterclaims.

The Court further finds that Plaintiffs are entitled to the requested preliminary injunction because they have

demonstrated a likelihood of success on the merits of their cause of action for recognition of the English Judgments and a risk of irreparable harm absent the injunction in view of Defendants' demonstrated participation in a fraudulent scheme to hide assets from creditors (see CPLR § 6301).

The Court further finds that Plaintiffs are entitled to appointment of a receiver pending any appeal herein and until further order of this Court, pursuant to CPLR § 6401.

The Court further finds that the English Judgments meet the standards for recognition set forth in Article 53 of the New York Civil Practice Law and Rules and under the common law of the State of New York in that the English Judgments grant Plaintiffs recovery of sums of money (other than for taxes, a fine or other penalty, or for support in a matrimonial or family matter) and are final, conclusive between the parties and fully enforceable in England (see CPLR §§ 5301, 5302, 5303); that the English courts provide impartial tribunals with procedures compatible with American requirements of due process of law (see CPLR § 5304(a)(1)); that Defendants have failed to present evidence sufficient to create a genuine issue of fact in relation to their contention that the English legal system failed to afford them procedures compatible with the requirements of due process of law (see *id.*); that the English courts in fact afforded the Defendants protections compatible with the fundamental American notions of due process of law; that the English courts had personal jurisdiction over the Defendants (see CPLR § 5304(a)(2)), as fully litigated before and adjudicated by the English trial and appellate courts (including England's highest court, the House of Lords),

pursuant to an application of England's rule of "necessary or proper party" jurisdiction; that as applied with respect to these Defendants, said rule is compatible with New York law regarding personal jurisdiction over non-resident co-conspirators and thus provides no basis for rejecting the English courts' determination of jurisdiction (see CPLR §§ 5304(a)(2), 5305(b)); that the English courts provided Defendants with ample opportunity to research and produce whatever evidence they wished in respect of the issue of personal jurisdiction and fully considered the plaintiffs' and the defendants' evidence concerning the residence of the anchor defendant (see CPLR § 5304(b)(3)); that the English trial court did not enter the judgments until after it determined the issue of personal jurisdiction; that the English trial court expressly provided Defendants with ample opportunities to respond to the merits of Plaintiffs' $300 million claims alleging a massive, multinational fraudulent conspiracy notwithstanding Defendants' repeated elections not to avail themselves of numerous opportunities to purge themselves of their contempts of the English court's orders; that Defendants had ample notice of and opportunity to be heard in all proceedings before the English courts relating to entry of the judgments in question (see CPLR § 5304(b)(2)); that the Defendants ultimately elected to take default judgments, resting upon their rejected objections to the English courts' jurisdiction over them; and that Defendants have failed to present evidence sufficient to create a genuine issue of material fact in support of any of their CPLR § 5304 defenses to the conclusiveness or recognition of the English Judgments. Each of the issues raised by the Defendants in respect of the English proceedings was either adjudicated therein or waived by the Defendants.

NOW, THEREFORE, after due deliberation, and upon motion of Proskauer Rose LLP, attorneys for the Plaintiffs, it is

ORDERED that Plaintiffs' Motion to Confirm the Order of Attachment is GRANTED in its entirety; and it is further

ORDERED that the Ex Parte Order of Attachment herein signed on May 25, 2000 and entered on May 30, 2000 be, and the same hereby is, confirmed; and it is further

ORDERED that Plaintiffs' Monitoring Motion is GRANTED in its entirety; and it is further

ORDERED that, pursuant to CPLR §§ 6301 and 6311, Defendants and each of their officers, directors, employees, agents, representatives, successors and assigns, and all other persons acting under their direction or control or in active concert or participation with them, be, and hereby are, ENJOINED AND RESTRAINED from selling, assigning, transferring, encumbering, mortgaging, pledging, disposing of, or otherwise relinquishing to any persons) or entity(ies) ownership, possession, custody or control of (i) their respective interests in the Hotel Gorham or any assets thereof or proceeds therefrom or (ii) their respective interests in any other property, real or personal, tangible or intangible, located within the State of New York, up to the extent of THREE HUNDRED AND THIRTY MILLION DOLLARS (U.S.$330,000,000.00); and it is further

ORDERED that, pursuant to CPLR § 6401(a), this Court's May 25, 2000 temporary appointment of the Special

Monitor to oversee the finances of the Hotel be, and hereby is, confirmed and continued until such time as Defendants turn over the Hotel and all of its assets and accounts to Judge Sherman in capacity as a post judgment receiver pursuant to the provisions of this Judgment and Order; and it is further

ORDERED that Plaintiffs' Summary Judgment, Receivership and Turnover Motion is GRANTED in its entirety; and it is further

ORDERED that Defendants' Motion to Dismiss is DENIED in its entirety; and, accordingly, it is further

ORDERED AND ADJUDGED that, in accordance with Article 53 of the New York Civil Practice Law and Rules and the common law of the State of New York, the English Judgments be, and hereby are, recognized and docketed as final, conclusive and fully enforceable money judgments of this Court in favor of Plaintiffs, CIBC MELLON TRUST COMPANY, a Canadian corporation with its principal place of business located at 320 Bay Street, Toronto, Ontario, Canada, and DAIMLERCHRYSLER CANADA INC., a Canadian corporation with its principal place of business located at 2450 Chrysler Centre, Windsor, Ontario, Canada, and against Defendants, MORA HOTEL CORPORATION N.V. and CHASCONA N.V., each being a Netherlands Antilles corporation with its principal place of business located at 136-138 West 55th Street in the City, County and State of New York, in the following amounts:

As against MORA HOTEL CORPORATION N.V., in the principal amounts of

(U.S.) $238,360.77, (Can.) $357,738.21 plus (U.S.) $386,687.95 plus (U.S.) $163,710,894.59, (Can.) $245,701,477.70 plus (U.S.) $134,315,511.10; interest in the sum of $29,945,035.62, and costs and disbursements in the sum of $260, and total sum of $328,596,750.23:

As against CHASCONA N.V., in the principal amounts of (U.S.) $163,964,876.36, (Can.) $246,082,660.00 plus (U.S.) $134,727,530.30; plus interest in the sum of $29,901,975.08, costs and disbursements in the sum of $260.00, and total sum of $328,594,651.74;

and that Plaintiffs have execution for said amount plus interest thereon at the New York statutory rate of nine percent (9%) per annum from and after the dates thereof plus such costs and disbursements as herein may be taxed by the Clerk; and it is further

ORDERED AND ADJUDGED that Plaintiffs' interest in Defendants' property secured by this judgment relates back in time to June 7, 2000, the date of the abovementioned sheriff s levy on Defendants' property pursuant to the Order of Attachment; and it is further

ORDERED that, pursuant to CPLR §§ 5228 and 5225:

(A) The Honorable Burton S. Sherman be, and hereby is, appointed as receiver (the "Receiver") of all real and personal property situate in the State of New York in which Defendants have an interest (the "Property"), including (but not limited to):

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(i) the land and buildings commonly known as 136-138 West 55th Street in the City, County, and State of New York, Section 4, Block 1007, Lot 49, including (but not limited to) the Hotel Gorham, and

(ii) all the assets of the Hotel Gorham and all proceeds therefrom, including (but not limited to) all of the Hotel's and/or the Defendants' bank, brokerage and money market accounts (including but not limited to Chase Manhattan Bank accounts numbered 0131-124489, 013-1-270415, 013-1-276099, 013-1-276107, 013-5-055342 and 777-117711 and Vista money market accounts numbered 677-50026096, 677-50026214 and 677-50027253), and all receivables and claims of any kind, liquidated or unliquidated, direct or derivative; and

(B) Upon the docketing herein of the English Judgments as judgments of this Court, Defendants (and their agents and representatives) forthwith shall turn over to the Receiver title, possession, custody and control of the Property and execute such documents as the Receiver may deem necessary to effect such turnover, including but not limited to a deed or deeds and assignments with respect to any lease or leases; and

(C) the Receiver shall take title, possession, custody and control of the Defendants' Property and, incident thereto, shall, among other things:

(i) pending a sale of Hotel Gorham, take control of the management and operation of said Hotel and all proceeds therefrom and all receivables and other claims thereof, including but not limited to having sole and exclusive

signature authority over all of the Hotel's and/or the Defendants' bank, brokerage and money market accounts; and

(ii) preserve, either in an interest-bearing escrow account or by prudent investment, the excess cash flow, profits and/or retained earnings of the Hotel (the "Preserved Profits") pending a sale of the Hotel; and

(iii) market, prepare for and consummate in due course a commercially reasonable sale of the Hotel in an arm's-length private market transaction; and

(iv) remit to the Plaintiffs the net proceeds of said sale of the Hotel, together with all Preserved Profits, less such commission or compensation as may be due and payable to the Receiver and approved by the Court; and

(v) reimburse Plaintiffs for all fees and expenses paid and to be paid to the Hon. Burton S. Sherman as special fiscal monitor appointed pursuant to this Court's order dated May 25, 2000, and his lawyers and accountants retained in connection with this matter; and

(vi) remit to Defendants attorneys of record, Willkie Farr & Gallagher ("Willkie Farr"), funds from Defendants' bank and brokerage accounts in such amount as in the Receiver's judgment is reasonable and sufficient to compensate Willkie Farr for the billed but unpaid-for legal services it has rendered to Defendants herein through and including the date of entry of this Judgment and Order, provided, however, that the Receiver shall not make any

payment to Willkie Farr in respect of any services rendered in anticipation of or in relation to any appeal from this Judgment and Order or in anticipation of or in relation to any motion to stay enforcement or execution of any portion of this Judgment and Order; and

(vii) continue to make all payments for obligations incurred in the ordinary course of business of the hotel including ordinary and necessary vendor and payroll expenses.

(D) the Receiver, subject to such further approval of the Court as the Receiver deems appropriate after consultation with Plaintiffs, shall:

(i) make all decisions concerning the management and operation of the Hotel, including but not limited to decisions concerning the hiring and firing of Hotel officers and employees and the marketing and sale of the Hotel; and

(ii) retain such hotel property management consultant(s), hotel operator or hotel operating company, real estate broker(s), market consultant(s), lawyer(s), accountant(s) and/or other specialized assistance as in the Receiver's judgment is necessary and appropriate to assist the Receiver in carrying out his duties; and

(iii) pay from the assets of the Hotel the fees and expenses of the Receiver and any parties retained by him pursuant to the immediately preceding subdivision (D)(ii); and

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(iv) pending a sale of the Hotel, retain all Profits and cash balances except for the payment of such expenses as provided for in this Order until such time as Defendants have exhausted all available appeals or until the hotel is sold, and

(E) Pursuant to CPLR 6403, the receiver within 10 business days of the date of this Order shall file an undertaking in the amount of $500,000 and upon such filing, such undertaking shall supercede any undertaking furnished by said receiver in his former capacity as paid fiscal monitor.

ENTER:

Dated: January __, 2001

s/ I. Norman Goodman
J.S.C.

_____
Clerk

Supreme Court, U.S.
FILED
SEP 10 2003
OFFICE OF THE CLERK

No. 03-213

IN THE

Supreme Court of the United States

MORA HOTEL CORPORATION N.V. and CHASCONA N.V.,

Petitioners,

—v.—

CIBC MELLON TRUST COMPANY, in its capacity as Trustee of the Chrysler Canada Ltd.'s Benefits Plan, the Chrysler Canada Ltd. Master Trust Fund, the Chrysler Canada Ltd. Non-Canadian Master Trust Fund, the Holmes Foundry Division Master Trust Fund, and the Chrysler Canada Ltd. Supplemental Unemployment Benefit Plans, and DAIMLERCHRYSLER CANADA INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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3 1 pp.

QUESTION PRESENTED

New York law, like the law of many states, provides that foreign money judgments should not be refused recognition for lack of personal jurisdiction where the defendant "voluntarily appeared in the proceedings, other than for the purpose of . . . contesting the jurisdiction of the court over him." After jurisdiction over petitioners was affirmed by the English judiciary up through the House of Lords, the New York Court of Appeals upheld the recognition of the English judgments against a defense of lack of personal jurisdiction in England. The Court held that the defendants had voluntarily appeared in the English courts because they had "argu[ed] the merits of the conspiracy claims in the English proceedings," "made arguments and presented proof" and caused the English judges to spend "considerable time . . . on the issue of the legal merits of the claims against" them, and thereby had done "more than they had to do to preserve a jurisdictional objection," including submitting very extensive papers and participating in a six-day hearing.

Does the New York Court of Appeals' interpretation and application of that New York statute, in the circumstances of this case, warrant review by this Court?

LIST OF PARTIES

Plaintiffs below are CIBC Mellon Trust Company ("CIBC Mellon") and DaimlerChrysler Canada Inc. ("DCCI"). CIBC Mellon is a Canadian trust company that serves as Trustee for certain employee retirement and pension plans maintained by DCCI. After obtaining several money judgments in England for damages from a many-tentacled fraudulent financial conspiracy, CIBC Mellon and DCCI commenced a proceeding in New York state court to recognize and enforce two of those judgments against petitioners in New York.

Defendants below, Mora Hotel Corporation N.V. and Chascona N.V., are privately-held Netherlands Antilles corporations that conducted business at the site of the Gorham Hotel, at 136 West 55th Street in New York, New York. Chascona held the fee interest, and Mora was the lessee.

RULE 29.6 CORPORATE DISCLOSURE

CIBC Mellon is 50% owned by Canadian Imperial Bank of Commerce, and 50% owned by Mellon Bank, N.A. through holding corporations. Mellon Bank, N.A. is itself 100% owned by Mellon Financial Corporation.

DCCI is a wholly-owned subsidiary of DaimlerChrysler Corporation, a public corporation headquartered in Detroit, Michigan.

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JURISDICTION

Jurisdiction over the issues presented by the first two questions presented in the Petition is properly invoked pursuant to 28 U.S.C. § 1257. The issue presented by the third question presented and argued in Point III of the Petition was neither raised nor decided below, and should therefore not be considered by this Court. *Adams v. Robertson*, 520 U.S. 83, 86 (1997); Robert L. Stern *et al.*, Supreme Court Practice 171 (8th ed. 2002).

STATUTES INVOLVED

This case involves Article 53 of the New York Civil Practice Law and Rules (CPLR), titled "Recognition of Foreign Country Money Judgments," and in particular, sections 5302-5305 thereof, which provide in pertinent part:

§ 5302. Applicability

> This article applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.

§ 5303. Recognition and enforcement

> Except as provided in section 5304, a foreign country judgment meeting the requirements of section 5302 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. Such a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense.

§ 5304. Grounds for non-recognition

> **(a) No recognition.** A foreign country judgment is not conclusive if:
>
> 1. the judgment was rendered under a system which does not provide impartial tribunals

or procedures compatible with the requirements of due process of law;

2. the foreign court did not have personal jurisdiction over the defendant. * * * *

§ 5305. Personal jurisdiction

(a) Bases of jurisdiction. The foreign country judgment shall not be refused recognition for lack of personal jurisdiction if:

1. the defendant was served personally in the foreign state;

2. the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or for contesting the jurisdiction of the court over him; * * * *

(b) Other bases of jurisdiction. The courts of this state may recognize other bases of jurisdiction.

COUNTER-STATEMENT OF THE CASE

Plaintiffs (respondents here) commenced this action to recognize and enforce in New York two money judgments that had been entered in England against the petitioners and numerous others ("the English Judgments") in an international fraudulent conspiracy case. This action was brought pursuant to, and decided under, the New York statute governing recognition of foreign country money judgments, Article 53 of the New York Civil Practice Law and Rules.

Petitioners misleadingly argue as though this were a conspiracy case in which the lower courts asserted jurisdiction in an unconstitutional manner. This is not a conspiracy case, and does not concern a New York court's exercise of jurisdiction. It is, rather, merely a garden-variety judgment recognition proceeding, involving judgments rendered in England, with the usual last-ditch jurisdictional arguments — none well-founded in the record — now thrown up to resist recognition.

Notwithstanding petitioners' efforts to imbue this case with substantial constitutional issues, the only question actually presented is whether the application by the New York courts of the New York judgment recognition statute, based on the Uniform Foreign Money-Judgments Recognition Act, and fully consistent with longstanding provisions of the Restatement [Second] of Conflict of Laws and Restatement [Third] of Foreign Relations Law, violated defendants' Fourteenth Amendment right not to be deprived of property without due process of law. Given the lack of any serious disagreement about the legal principle applied by the New York Court of Appeals — that "a defendant may be deemed to have made an appearance in an action, and, therefore, to have submitted to a court's jurisdiction, by, among other things, "taking steps in the action *after judgment either in the trial court or in an appellate court*" (Pet. App. 13a, citations to the Restatements of Conflicts of Laws and Foreign Relations Law omitted) — this case presents no issue whatever warranting this Court's review.

In their zeal to present a serious constitutional issue, petitioners wrongly accuse the New York Court of Appeals of lapses that did not occur and grossly mischaracterize the case. The Court of Appeals did not retroactively validate a void judgment, it did not waive a constitutional right of the petitioners, and it did not exercise a constitutionally impermissible form of jurisdiction. All it did, in the ruling complained of, was to (1) affirm the lower courts' conclusions that the English court had personal jurisdiction as required under the New York recognition statute, and (2) decline to review any further petitioners' claim that the English court lacked jurisdiction because petitioners had rendered consideration of that claim unnecessary when they affirmatively invoked the English court's jurisdiction in a post-judgment motion. Pet. App. 9a.

The two lower courts had already determined that the English court had jurisdiction from the outset (as three English courts had determined as well). It was petitioners' own affirmative conduct that blocked their ability (by obviating any need) to obtain yet a third hearing of their jurisdictional objection by a New York court, under a straightforward application of the provisions of New York's foreign judgment enforcement law providing that voluntary appearance generally represents a submission and eliminates any further challenge to personal jurisdiction. There is therefore no merit whatever to petitioners' defense or this petition. There is no serious doubt that the recognition and enforcement of the English Judgments does not violate the Fourteenth Amendment, and no conflict with any cited decisions of other courts on that point.

The judgment of eight English judges is that petitioners were properly subject to personal jurisdiction in England, and twelve unanimous judges in New York agreed that the English Judgments are entitled to recognition. There are no conflicts and no other "compelling reasons" (S. Ct. R. 10) for this Court to review the New York courts' determinations under the New York statute.

A. The New York Recognition Statute.

In New York, the recognition of foreign money judgments has been governed by Article 53 of the New York Civil Practice Law and Rules ("CPLR") since 1970. Article 53 is patterned on the Uniform Foreign Money-Judgments Recognition Act. Both before and after the statute was enacted, "New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts." Pet. App. 6a.[1]

Article 53 is a statutory outgrowth of the common-law comity doctrine. New York's comity doctrine embodies "an ordered sense of respect and tolerance for the adjudications of foreign Nations, paralleling that commanded among the States by the Full Faith and Credit Clause of the United States Constitution." *Gotlib v. Ratsutsky*, 83 N.Y.2d 696, 700 (1994). "The comity doctrine is . . . pragmatically necessary to deal properly and fairly with the millions of relational and transactional decrees and determinations that would otherwise be put at risk, uncertainty and undoing in a world of different people, Nations and diverse views and policies." *Id.* at 700.

CPLR Article 53 was intended to codify and clarify existing case law concerning the recognition and enforcement of foreign money judgments, and to promote the efficient enforcement of New York judgments abroad by "assuring foreign jurisdictions that their judgments would receive streamlined enforcement here." Pet. App. 6a-7a.

Under the statute, a foreign money judgment "is conclusive," CPLR 5303, and "must be enforced absent a showing of one of the grounds for nonrecognition specified

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[1] New York's generous tradition of enforcing foreign judgments extends equally to judgments that were entered on default, as here. *See Taub v. Taub*, 283 A.D.2d 567 (2d Dep't 2001); *Constandinou v. Constandinou*, 265 A.D.2d 890 (4th Dep't 1999); *Soloman Ltd. v. Biederman & Co.*, 177 A.D.2d 350, 350 (1st Dep't 1991); *Aspinall's Club Ltd. v. Aryeh*, 86 A.D.2d 428, 434 (2d Dep't 1982).

in CPLR 5304." *Watary Servs., Ltd. v. Law Kin Wah*, 247 A.D.2d 281, 282 (1st Dep't 1998). However, New York courts will not enforce a judgment if it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law" or if the foreign court "did not have personal jurisdiction over the defendant." CPLR 5304(a)(1), (a)(2). Listing several jurisdictional bases that must be recognized, CPLR 5305(a)(2) provides that a foreign judgment "shall not be refused recognition for lack of personal jurisdiction if . . . the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or for contesting the jurisdiction of the court over him."

Although CPLR 5304(a) thus requires that the foreign judicial system had procedures compatible with due process and that the foreign court had jurisdiction over the defendant, there is no requirement that the foreign court's procedures or jurisdiction conform to those of New York or the United States. Indeed, CPLR 5305(b) specifically permits the court to recognize "other bases of jurisdiction" beyond the common bases specifically enumerated in CPLR 5305(a). Similarly, CPLR 5304(a)(1) requires only that there be a "system" compatible with the requirements of due process, not that the foreign country's procedures must be identical to ours or must follow every "jot and tittle" of the particular species of due process adopted by the enforcing state. *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 476-77, 478 (7th Cir. 2000); *see also Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 330 (5th Cir. 2002); *Guinness PLC v. Ward*, 955 F.2d 875, 900 (4th Cir. 1992).

The absence of any statutory requirement that the foreign procedures conform precisely to our own is consistent with the traditional rule of comity that "[r]ecognition will not be withheld merely because . . . the rendering jurisdiction applies a law at variance with that which would be applied under New York . . . principles."

Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 279 (1970). "[M]ere divergence from American procedure does not render a foreign judgment unenforceable," for, in Judge Cardozo's words, "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." *Pariente v. Scott Meredith Literary Agency, Inc.*, 771 F. Supp. 609, 616-17 (S.D.N.Y. 1991) (quoting *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111 (1918) (Cardozo, J.)). *See also Hilton v. Guyot*, 159 U.S. 113, 204-05 (1895) (discussed in *Pariente*, 771 F. Supp. at 617); *Ackermann v. Levine*, 788 F.2d 830, 842 (2d Cir. 1986); *Canadian Imperial Bank of Commerce v. Saxony Carpet Co.*, 899 F. Supp. 1248, 1252 (S.D.N.Y. 1995), *aff'd*, 104 F.3d 352 (2d Cir. 1996).

Recognition may not be defeated by raising factual or procedural issues that were or could have been encompassed within the proceedings before the foreign court (such as, here, whether petitioners or their owner, Marco Gambazzi, were members of the fraudulent conspiracy or committed wrongful acts), and any effort to consider or reopen those matters is improper. *See Greschler v. Greschler*, 51 N.Y.2d 368, 375-76 (1980); *Dunstan v. Higgins*, 138 N.Y. 70, 74-75 (1893); *see also Fickling v. Fickling*, 210 A.D.2d 223, 224 (2d Dep't 1994); *Porisini v. Petricca*, 90 A.D.2d 949, 950 (4th Dep't 1982). *Cf. Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 78 N.Y.2d 572, 577-78 (1991) (inquiry into the factual matters underlying a sister-state judgment is foreclosed in a judgment recognition proceeding), *cert. denied*, 506 U.S. 823 (1992); *Home Ins. Co. v. American Home Products Corp.*, 75 N.Y.2d 196, 205 (1990) (improper to engage in collateral review of merits of sister-state court's determination).

B. The English Proceedings.

Petitioners Mora and Chascona were named as defendants in a huge, multi-national fraudulent conspiracy suit in England. They were two of the 45 corporate defendants owned or controlled by the four individual

defendants and used by the individual defendants in fraudulent financial transactions. Owned and directed by defendant Marco Gambazzi, Mora and Chascona joined Gambazzi in asserting a challenge to personal jurisdiction in the English court. Based upon voluminous evidentiary submissions by plaintiffs, the English trial court made a *prima facie* determination that it had jurisdiction under the English "necessary or proper parties" rule, which in this conspiracy case was similar to the American form of co-conspirator jurisdiction over non-resident members of a conspiracy that has connections to the jurisdiction. The materials presented to the English courts demonstrated, *inter alia*, that the ringleader of the fraudulent conspiracy lived in England and that material acts in furtherance of the conspiracy took place in England. Petitioners litigated and lost their jurisdictional challenge in the trial court, Court of Appeal, and House of Lords.

Despite being afforded notice and an opportunity to be heard, petitioners initially adopted a strategy of non-participation in the proceedings, which they maintained even after being found subject to jurisdiction at the trial and appellate levels. They refused to comply with repeated court orders requiring disclosure, and ignored warnings that default judgments would be entered for non-compliance. Petitioners allowed default judgments to be entered against them, and failed to appear at the damages hearings. The judgments encompassed the total damages from the conspiracy because in England, as here, there is joint and several liability in fraudulent conspiracy cases.

Throughout these proceedings, petitioners and Gambazzi (all represented by the same English counsel) indisputably received ample notice of, and opportunity to be heard on, the exercise of jurisdiction over them, the claims asserted against them, the amount of damages sought, the *Mareva* orders against them, the "unless" orders against them (*see* Pet. App. 4a), and the damages assessment hearing. They made a knowing strategic choice not to participate and to let the

default judgments be entered. *See* Pet. App. 52a (defendants "elected to take default judgments, resting upon their rejected objections to the English courts' jurisdiction").

Subsequent to the New York Supreme Court's order recognizing and enforcing the judgments and the Appellate Division's affirmance, however, but before argument in the New York Court of Appeals, petitioners applied to the English High Court to set aside the default judgments entered against them, and for leave to defend the conspiracy and tracing claims on the merits. Pet. App. 6a, 12a-13a. After a six-day hearing, at which it considered "more than sixty lever-arch files [binders]", the High Court dismissed defendants' applications. *Id.* at 12a n.4.

C. The New York Proceedings.

Plaintiffs commenced an action in New York for recognition of the English Judgments, and sought summary judgment granting recognition. Defendants resisted, asserting that the English court lacked personal jurisdiction under CPLR 5304(a)(2) because the exercise of jurisdiction under the English "necessary or proper parties" rule did not meet the requirements of New York law and due process.

The trial court granted summary judgment to plaintiffs, finding that the English Judgments met the requirements for recognition under Article 53 of the CPLR and that none of the exceptions listed in CPLR 5304 applied to bar recognition. Pet. App. 51a-52a. The trial court ruled that the English court had personal jurisdiction over the defendants, as adjudicated by the English trial and appellate courts, and that England's rule of "necessary or proper party" jurisdiction, in the circumstances of this case, is compatible with New York co-conspirator jurisdiction. *See* CPLR 5304(a)(1), 5305(b); Pet. App. 51a- 52a.

The five-member Appellate Division unanimously affirmed the grant of summary judgment on different grounds. Rather than treating the English courts' extensive adjudication of personal jurisdiction under English law as *res*

judicata, the Appellate Division instead analyzed whether the materials before the English court established a *prima facie* case of conspiracy jurisdiction under New York norms (*i.e.*, acts of the conspiracy took place in the forum), and found that they did. Pet. App. 35a-42a. Defendants' belated assertions of innocence and non-involvement in the conspiracy had not been presented to the English court because defendants had defaulted, and therefore could not retroactively negate the *prima facie* basis that did exist for the English court's exercise of jurisdiction. *Id.* at 41a-42a.

On further appeal, the New York Court of Appeals held that "the English judgments at issue satisfy the statutory prerequisites for recognition." Pet. App. 1a. First, the Court rejected the defendants' argument under CPLR 5304(a)(1), which bars recognition if the foreign judicial system lacks impartial tribunals and procedures compatible with due process. *Id.* at 8a-9a.

Turning to defendants' argument under CPLR 5304(a)(2) that the English court lacked personal jurisdiction, the Court of Appeals addressed the contention that plaintiffs had made in a motion to dismiss the appeal, namely that after the New York Appellate Division's decision the defendants had "voluntarily appeared in the proceedings" within the meaning of CPLR 5305(a)(2) when they made an affirmative application to the English court to set aside the English Judgments and allow them to defend on the merits. Pet. App. 9a-13a. Applying CPLR 5305(a)(2), the Court of Appeals found that the defendants' invocation of the English court's jurisdiction at a later stage in the same proceedings did qualify as a voluntary appearance in the proceedings, because "they did more than they had to do to preserve a jurisdictional objection." *Id.* at 12a-13a. Plaintiffs had argued that this submission to English jurisdiction either mooted the appeal or acted as a judicial estoppel against inconsistent positions. However, the Court of Appeals decided only that, under CPLR 5305(a)(2), the voluntary appearance "abrogate[d] the reviewability of defendants' argument that the

English judgments are unenforceable in New York because the English courts lacked jurisdiction over them." *Id.* at 9a; *see also id.* at 12a-13a. It is that ruling — that petitioners' application to the High Court to set aside the English Judgments and to defend on the merits constituted a "voluntar[y] appear[ance] in the foreign proceeding within the meaning of CPLR 5305(a)(2)" (Pet. App. 13a) — which petitioners challenge here.

REASONS FOR DENYING THE WRIT

I. THE NEW YORK COURT OF APPEALS DID NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS.

A. New York's Decision To Recognize The English Judgments Based Upon Petitioners' Voluntary Appearance Before The English Courts Does Not Violate Petitioners' Due Process Rights.

Petitioners' argument, stripped of all bells and whistles, is that a New York court cannot, consistent with United States constitutional due process protections, enforce in New York a foreign judgment that is rendered against an entity that has voluntarily subjected itself to the foreign court's jurisdiction. Petitioners' position is not in accordance with general principles underlying personal jurisdiction or with this Court's longstanding jurisprudence delineating the due process clause's scope and reach, and no conflicts warrant this Court's review.

An objection to personal jurisdiction, like any other personal right, can be expressly or impliedly waived by words or conduct. *See Ins. Corp of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). And voluntarily presenting the merits of a dispute to a competent tribunal for resolution or affirmatively utilizing procedural tools provided by a specific tribunal are two of the usual grounds on which courts find submission to a court's jurisdiction or waiver. *See id.* at 704 (citing *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938)).

Of particular importance here are this Court's conclusions that "an individual may submit to the jurisdiction of the court by appearance," and that "[a] variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court." *Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 703. This Court has also held

that "what acts of the defendant shall be deemed a submission to [a court's] power is a matter upon which States may differ," *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29-30 (1917).

The New York Court of Appeals, consistent with these well-settled principles, ruled simply that petitioners' post-judgment appearance before an English High Court in which the petitioners submitted evidence pertaining to the merits of the fraud claims against them and in which petitioners failed "to preserve any objection to the High Court's jurisdiction" constituted a voluntary appearance under CPLR 5305. Pet. App. 12a-13a.

The New York Court of Appeals did not retroactively validate a void English judgment and it did not abrogate the petitioners' ability to assert the defense of lack of personal jurisdiction. It merely analyzed petitioners' actions before the English courts in accordance with this Court's teachings, and concluded that petitioners had voluntarily appeared by affirmatively arguing the "merits of the conspiracy claims in the English proceedings" and doing more than they had to do to preserve any jurisdictional objections. Pet. App. 12a. By making a voluntary appearance as defined by New York law, the petitioners waived their right to contest any further whether the English court had personal jurisdiction over them (*see id.* at 13a), without running afoul of the due process clause.

This holding is not in conflict with any judicial opinion issued by this or any other Court, and is directly supported by this Court's holding in *Chicago Life Ins. Co. v. Cherry* (cited approvingly in *Ins. Corp. of Ireland, Ltd.)* and its progeny. In that case, a Tennessee state court entered judgment against a group of insurance companies notwithstanding the fact that the insurance companies had allegedly never been served with process. *See Chicago Life Ins. Co.*, 244 U.S. at 29. When the insured sought to enforce the judgment against the insurer's assets in Illinois, the insurer contended, like petitioners here, that enforcing the judgment would violate its

procedural due process rights. *See id.* In ruling in favor of the insured, this Court observed that states have the power, in recognizing a foreign judgment, to decide what actions by a defendant constitute a voluntary appearance before the foreign tribunal (*see id.* at 30):

> If a statute should provide that filing of a plea in abatement, or taking the question [of personal jurisdiction] to a higher court should have that effect [of waiving a litigant's right to later contest the propriety of personal jurisdiction], it could not be said to deny due process of law ... If without a statute a court should decide [that a litigant's actions in a foreign court operated as a voluntary appearance there] ..., it would infringe no rights under the Constitution of the United States ... It can be no otherwise when a court so decides as to proceedings in another state. It may be mistaken upon what to it is a matter of fact, the law of the other state. But a mere mistake of that kind is not a denial of due process of law.

None of the cases petitioners cite is apposite or weakens the conclusive force of *Chicago Life Ins. Co.* For example, *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 616 (1990), flatly rejected as a "thorough misunderstanding of our cases" the contention that in the absence of "continuous and systematic" contacts, a forum state was precluded from exercising jurisdiction over a non-resident who was served with process while in that state. *Burnham*'s reference to the long-standing rule that a judgment rendered by a court lacking personal jurisdiction is void under the principle of *coram non judice* does not aid petitioners, because that is not what happened here. In this case, the New York courts determined that the English court had personal jurisdiction over petitioners. Thus, under New York law, the English Judgments were not void. Whether New York was factually or legally incorrect in making this determination is, as explained

in *Chicago Life Ins. Co. v. Cherry*, of no constitutional moment.

For this reason, petitioners' citations to *Pennoyer v. Neff*, 95 U.S. 714 (1878), *Monroe v. Niven*, 20 S.E.2d 311 (N.C. 1942), *Keen v. Keen*, 60 A.2d 200 (Md. 1948), and *Wiles v. Wiles*, 315 P.2d 131 (Or. 1957), are meritless. In none of those cases, or any other case petitioners cite, did a litigant seek to challenge a state court's conclusion that a foreign court *had* personal jurisdiction over the party challenging the judgment. Instead, in the cases cited, the courts concluded that the court issuing the challenged judgment *did not have* personal jurisdiction.[2] Given these facts and the additional fact that three courts in England and three unanimous courts in New York all ruled that the English courts had personal jurisdiction over petitioners, their heavy reliance on the principle of *coram non judice* is puzzling. At best, petitioners' purported "due process" arguments amount to nothing more than a complaint that the New York Court of Appeals did not rule their way.

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[2] For example in *Gallagher v. Nat'l Nonpartisan League*, 205 N.W. 674, 675 (N.D. 1925), the North Dakota Supreme Court concluded that it was error for a lower court to enforce a judgment when it was clear that, upon the record presented, the judgment was issued even though the defendants had never been served with process. Similarly, in *Roberts v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 51 N.W. 478 (Minn. 1892), *aff'd*, 164 U.S. 703 (1896), the Minnesota Supreme Court did not discuss the issue of recognizing a foreign judgment. It only discussed whether a defendant's attempt to remove a case to federal court suspended state court proceedings such that a state judgment that was later issued was "void for want of jurisdiction." *Id.* at 478. Although the Court there noted in passing that defendant's attempt to vacate the state court judgment entered against it did not subject the defendant to the state court's jurisdiction, there is absolutely no indication that the defendant there, unlike here, ever argued the merits of its case to the Minnesota state court when seeking to vacate the judgment. *See id.* at 479. In *Bischoff v. Wethered*, 76 U.S. 812, 812 (1869), this Court refused to enforce an English judgment, the only evidence of which consisted of an "exemplified copy of a judgment ... , without [any evidence that the defendant was served properly], or [had] any notice of the suit." Obviously, this is not what happened to petitioners.

The rule relied on by the New York Court of Appeals to reject petitioners' defense is well within the limits of due process, and petitioners cite no case holding otherwise. *See Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 709 (challenge to personal jurisdiction waived as a sanction for non-compliance with court order); *Nat'l Equip. Car Rental, Ltd. v. Szukhent,* 375 U.S. 311, 316 (1964) (agreement in advance to submit to court's personal jurisdiction was sufficient basis for personal jurisdiction); *Adam*, 303 U.S. at 67-68 (litigant's service of cross complaint pursuant to California law subjected him to the personal jurisdiction of the court there); and *Chicago Life Ins. Co.*, 244 U.S. at 29-30.

Moreover, that New York chose to reject petitioners' artificial distinction between a "post-judgment appearance" and a "pre-judgment appearance" does not give rise to any supposed procedural due process violation. Under New York law, the relevant inquiry is whether the defendant submitted to the foreign court's jurisdiction, "by, among other things, 'taking steps in the action *after judgment either in the trial court or in an appellate court*" (Pet. App. 13a) (quoting Restatement [Second] of Conflict of Laws, §33 cmt. b) — not whether the defendant's actions occurred prior to or after the judgment's entry. And nowhere does the Fourteenth Amendment, or the case law interpreting it, purport to restrict a state's power to decide that a defendant voluntarily submitted to a foreign court's jurisdiction sufficiently to recognize and enforce a foreign judgment, or to cabin that power to situations in which the defendant appeared prior to the judgment's entry.

Not only do petitioners cite no such case, at least one federal court to address that issue in the context of CPLR 5305(a) rejected any such distinction. In *S.C. Chimexim S.A. v. Velco Enters., Ltd.*, 36 F. Supp. 2d 206 (S.D.N.Y 1999), the court applied CPLR 5305(a)(2) to recognize a default judgment rendered in Romania despite the defendant's claim that the Romanian court did not have personal jurisdiction over it. Following entry of the default judgment in Romania,

the defendants appealed and during the course of the Romanian appellate proceedings attacked the default judgment on the merits, *see* 36 F. Supp. 2d at 215, just as the petitioners unsuccessfully did here.[3] The federal district court, like the New York Court of Appeals here, held that the defendant's activity in the Romanian appellate court operated as a voluntary appearance for purposes of CPLR 5305(a) and that "[o]n this basis alone ... the Romanian courts had personal jurisdiction over [the defendant]." *Id.* at 215; *see also Nippon Emo-Trans Co. v. Emo-Trans, Inc.*, 744 F. Supp. 1215 (E.D.N.Y. 1990) (defendant abrogated ability to raise jurisdictional defense to enforcement of a Japanese judgment after arguing merits of claims in Japan and losing jurisdictional defense there).

The formalistic rule petitioners imagine would not only interfere with New York's state sovereignty, but also encourage litigants abroad to engage in procedural gamesmanship under cover of the Fourteenth Amendment. Defendants in foreign cases would be rewarded for their decision to refrain from appearing until after judgment is entered by a foreign tribunal. A rule encouraging initially defaulting litigants to hold back their defenses and delay asserting them to a foreign court until after default judgment, or to relitigate their jurisdictional defense in U.S. courts even after raising the merits in the foreign court post-judgment, has nothing to recommend it.

B. The New York Court Of Appeals Did Not Retroactively Validate A Void Judgment.

Contrary to petitioners' submission, which contends that the New York Court of Appeals retroactively validated a

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[3] Petitioners' claim that the facts of *S.C. Chimexim* "are in striking contrast to this case, where Petitioners did not argue on the merits to the English Courts at any level," (Pet. App. 18), is in direct conflict with the Court of Appeals' factual determination that petitioners "were arguing the merits of the conspiracy claims in the English proceedings," Pet. App. 12a.

judgment which was void *ab initio* for lack of personal jurisdiction, the English Judgments were never void, and the unanimous decision by New York's highest court did not retroactively validate them. Rather, the New York Court of Appeals affirmed the unanimous findings of both the appellate and trial courts that the English courts had personal jurisdiction, and, pursuant to state statute, declined to consider petitioners' arguments to the contrary (arguments fully considered and rejected by both the appellate and trial courts) because petitioners had taken actions that precluded that defense.

Citing case law back to 1839, petitioners spend pages arguing that a judgment entered without jurisdiction is void. This assertion is accurate but irrelevant. The *coram non judice* principle is irrelevant here because the English judgments were rendered by a tribunal that *had* personal jurisdiction over petitioners. Every single court to have considered the issue has determined that the English trial court had jurisdiction over the petitioners at the time it rendered judgment against them.

The trial, appellate and highest courts of England – eight judges in all, including the five unanimous law lords in the House of Lords – considered and rejected petitioners' jurisdictional arguments in England. Despite the summary nature of recognition proceedings, *see* CPLR 5303 (permitting enforcement of a foreign judgment through expedited procedure of motion for summary judgment in lieu of complaint), petitioners were again given the opportunity to raise and litigate their jurisdictional defenses here in New York. They took full advantage of that opportunity, raising the due process "minimum contacts" arguments they now make to this Court. Both the trial and intermediate appellate courts in New York fully considered, and soundly rejected, petitioners' jurisdictional defense, holding that the English court had personal jurisdiction over petitioners such that the judgments should be recognized under New York state law. The refusal by the New York Court of Appeals to re-re-consider these

arguments, because of petitioners' intervening appearance in England, did not validate a void judgment. It left in place a judgment that the English courts and the Appellate Division had already determined to be jurisdictionally proper, and which was additionally proper (so far as New York law is concerned) because of CPLR 5305(a)(2).

The state court findings of fact on which the New York courts predicated recognition are never once addressed in the Petition, nor challenged by petitioners here—and are in any event unreviewable this Court, *see, e.g., Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-12 (1980) ("we customarily accept the factual findings of state courts...") (citing *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952)). Those findings, including the extent of petitioners' appearance in the English courts, fatally undermine the foundation upon which the Petition is constructed.

The New York Court of Appeals carefully reviewed commentary and case law construing CPLR 5302(a)(2) and determined that petitioners' post-judgment application fell within its terms. That determination was not a retroactive validation; it was a ruling that petitioners' appearance in England precluded any further contest of the English Court's personal jurisdiction. The question answered by the Court of Appeals was not whether petitioners' English application was a submission to jurisdiction, retroactive to the date they were served, but rather whether petitioners did more than they had to do to preserve their jurisdictional objections. Pet. App. 10a. If they did, they "forfeited the right to claim an exception" under CPLR 5305. David D. Siegel, CPLR Practice Commentaries C5305:1, 7B McKinney's Consol. Laws of N.Y. Ann. at 556 (West 1997). The Court of Appeals' determination that the petitioners' application to the English courts constituted such forfeiture was a matter of statutory interpretation and not, as petitioners would have it, a "defiant practice of judicial reincarnation." Pet. 19.

The New York Court of Appeals was well within its discretion in not addressing an argument that was rendered academic under CPLR 5305(a)(2) by petitioners' voluntary appearance in England to contest the merits of the fraud claims levied against them. No constitutional violation arises from the New York Court of Appeals' exercise of judicial discretion in this manner and none of the "compelling reasons" enunciated in Rule 10 of this Court's rules are present here.

II. THE QUESTIONS PETITIONERS RAISE CONCERNING THE DUE PROCESS IMPLICATIONS OF CONSPIRACY JURISDICTION ARE NOT PROPERLY PRESENTED ON THIS RECORD.

Petitioners seek this Court's review to "clarify the limits" on conspiracy jurisdiction, citing purported conflicts among the various states as to their application of this form of personal jurisdiction. But the Court of Appeals decided no issue of conspiracy jurisdiction, and its holding that petitioners' actual participation in the English courts obviated the need to address that issue makes its consideration by this Court equally unnecessary and inappropriate. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case"); *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable").

A. The Judgment Below Presents No Issue Of Conspiracy Jurisdiction Under New York Law Or Otherwise.

The Court of Appeals rendered no opinion about conspiracy jurisdiction and rested its judgment on quite other grounds. Indeed, *no* American court has issued any ruling in this case regarding the scope of conspiracy jurisdiction. The lower New York courts simply found that the English court's exercise of jurisdiction over petitioners was compatible with due process. Petitioners have no Constitutional right to insist that the English courts adhere to every "jot and tittle" of New York concepts of due process. *See* cases cited at 6-7 *supra.* Mere differences in foreign procedures are no bar to recognition, much less a constitutional bar.

Not only did the New York courts not consider the scope of American conspiracy jurisdiction; consideration of that issue is not necessary to decide the recognition case below. The English judgments are recognizable either on the Court of Appeals' rationale (participation obviated the objection to personal jurisdiction under CPLR 5305(a)(2)) or on the rationale of the trial court that England's jurisdictional rules, as applied, are sufficiently compatible with due process to permit recognition. Neither of those rationales calls for any searching examination into New York's own rules of conspiracy jurisdiction. Whether enforcement on that ground in New York would deprive petitioners of property without due process is a different question than whether, on some given set of facts, a U.S. state's exercise of personal jurisdiction over an absent defendant under a conspiracy jurisdiction theory offends due process of law.

Even putting to one side the absence of any holding on the issue by the New York Court of Appeals, or even its considered view, the record below is in any event a singularly inappropriate one to review for the "minimum contacts" petitioners now demand, given the limited nature of that record due to petitioners' willful default. That default necessarily limited the New York courts to the question of

whether the *prima facie* record made in England would support jurisdiction under New York norms. Thus, the Appellate Division applied New York law to determine if a New York court, faced with the identical record on a jurisdictional motion to dismiss, would also have denied that motion to dismiss on the *prima facie* record.

Because of defendants' default, that *prima facie* record of jurisdiction is now deemed established as a matter of law. *Staton Wholesale v. Barker*, 257 A.D.2d 902, 903 (3d Dep't 1999) (recognizing Texas judgment where defendant lost jurisdictional challenge and then defaulted in Texas; Texas' jurisdictional determination became *res judicata*).[4]

B. The New York Appellate Division Recognized The English Court's Jurisdiction Based Not On A Co-Conspirator's Domicile But On Acts Of The Conspiracy In England.

Even if *some* issue of conspiracy jurisdiction could be argued on this record, it would not be the issue that petitioners present in their second question and Point II. Petitioners' premise – that this case presents the issue whether jurisdiction may be predicated "under a co-conspiracy theory, where there are no acts or harmful effects in England and jurisdiction over that defendant was based solely on a residence of one alleged co-conspirator" (*see* Pet. at ii (second Question Presented) and Pet. 24) – is false.

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[4] Other New York state courts have applied this rule to recognize foreign country judgments. *Wimmer Canada, Inc. v. Abele Tractor & Equip. Co.*, 299 A.D.2d 47, 50-51 (3d Dep't 2002) (enforcing Canadian default judgment over defense of lack of personal jurisdiction; evidentiary record submitted in Canada showed basis for jurisdiction); *Porisini v. Petricca*, 90 A.D.2d 949 (4th Dep't 1982) (defendant who defaulted in England after litigating and losing personal jurisdiction challenge was bound by evidence before English court, and could not raise additional matters to challenge recognition).

The Appellate Division held that "[t]he affidavits and supporting materials provided to the English court were sufficient to have demonstrated, prima facie, that [petitioners] . . . were active participants in the conspiracy alleged in the present case *which conspiracy included acts which took place in England.*" Pet. App. 39a (emphasis added). The Appellate Division went on to specify examples of those English acts. *Id.* at 39a-41a. As petitioners have not argued that there is anything unconstitutional in the assertion of *in personam* jurisdiction on those grounds, petitioners' second question is not posed by this case and presents no issue for this Court's review.[5]

It is true that the *English court's* assertion of jurisdiction was based on the domicile of a co-conspirator, which is a proper basis for jurisdiction under English law.[6] But the Appellate Division applied New York law, not English law, in reviewing the English evidentiary record and determining that that English court had personal jurisdiction sufficient for New York to enforce the English judgments. Its application of New York law to the facts here, and its finding that co-conspirator jurisdiction existed over the petitioners, were based not on domicile but on the acts and effects of the conspiracy in England. Pet. App. 39a. Petitioners' attempt to obtain review of whether conspiracy jurisdiction *based on*

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[5] The Appellate Division correctly held that the evidence submitted in England of acts of conspiracy in England supported a finding of jurisdiction under New York principles. *See, e.g., Dixon v. Mack*, 507 F. Supp. 345, 348 (S.D.N.Y. 1980) (members of conspiracy subject to jurisdiction in forum where acts in furtherance of conspiracy took place); *Cleft of the Rock Found. v. Wilson*, 992 F. Supp. 574, 582 (E.D.N.Y. 1998) (same). Petitioners themselves approvingly cite numerous federal decisions upholding conspiracy jurisdiction where some acts in furtherance of the conspiracy have occurred in the forum state. Pet. 26-27.

[6] Notably, England, like the United States, nonetheless requires a court to consider issues of *forum non conveniens* before exercising jurisdiction over necessary or proper parties.

the domicile of an alleged conspirator is "patently unconstitutional under our Due Process Clause" (Pet. 24) fails at its premise.

III. NO ISSUE CONCERNING DISPARATE TREATMENT OF DOMESTIC AND FOREIGN JUDGMENTS WAS PRESENTED OR DECIDED BELOW, OR WARRANTS THIS COURT'S REVIEW.

Petitioners' third question presented, argued in Point III of the Petition, asks the Court to review whether New York's treatment of foreign judgment recognition proceedings differently from the treatment it accords state or federal judgments violates the Fourteenth Amendment. Pet. 28-30. They complain that New York's treatment of participation on the merits as foreclosing personal jurisdiction objections to foreign judgments, while participation is generally not preclusive of such objections for domestic judgments, is "discriminatory state action" violating the Equal Protection Clause. Only *Cooper v. Aaron*, 358 U.S. 1, 19 (1958), is cited to support this novel argument. Pet. 30.

Because petitioners' equal protection challenge was neither raised nor decided below, it presents no issue for this Court's review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997); Robert L. Stern *et al.*, Supreme Court Practice 171 (8th ed. 2002).

Nor, even if it were properly preserved, is the equal protection challenge, which implicates no conflict between the New York Court of Appeals and other appellate courts, worthy of this Court's attention.

First, New York does not distinguish between any groups of persons: differential treatment of judgments, where those *judgments* may be obtained by New Yorkers, other Americans, or foreigners, works no denial of equal protection.

Moreover, this Court has repeatedly recognized that differential treatment in and of itself does not violate the Constitution. As the classifications at issue here (foreign vs. domestic judgments, or merits vs. recognition proceedings) "neither involv[e] fundamental rights nor proceed[] along suspect lines," they are "accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). If there is a rational relationship between the disparate treatment and a legitimate governmental purpose, the classification "cannot run afoul of the Equal Protection Clause." *Id.*

The Constitution itself treats judgments rendered in a sister state or federal court differently from those rendered abroad; only the former are subject to the Full Faith and Credit clause of Article IV, Section 1 of the Constitution, which commands the courts of each State to accord full faith and credit to judgments of state courts, and to the Supremacy Clause, which commands comparable respect for federal judgments. The statute implementing the full faith and credit clause has never been successfully challenged for being constitutionally underinclusive.

No case petitioners cite, and none we have seen, finds an equal protection violation in the fact that recognition of foreign judgments is governed by basic principles of comity (codified by the 31 states, including New York, that enacted the Uniform Foreign Money-Judgments Recognition Act) rather than by the constitutional and statutory commands of full faith and credit for domestic judgments. The differences in such treatment, and the reasons for it (the balancing of international interests and the rights of its own citizens), were recognized by this Court as early as 1895. *See Hilton v. Guyot*, 159 U.S. 113, 141 (1895) (observing that whether a foreign judgment "shall be allowed to operate within the dominion of another nation, depends upon ... 'the comity of nations' ... international duty and convenience, and ... the rights of [the recognizing state's] own citizens, or of other persons who are under the protection of [the recognizing state's] laws"); *Jaffe v. Accredited Sur. & Cas. Co.*, 294 F.3d

584, 591 (4th Cir. 2002) (recognizing different standards in recognition of U.S. and foreign judgments). A rational basis clearly justifies any differing treatment.

Notably, too, any differences in treatment have inured to the benefit of petitioners here, not to their detriment. Had petitioners been sued in a sister state, lost a challenge to personal jurisdiction, and then defaulted in that state, the resulting judgment would have been subject to full faith and credit in New York without any opportunity for relitigation of the jurisdictional question. *See, e.g, Staton Wholesale v. Barker*, 257 A.D.2d 902, 903 (3d Dep't 1999) (recognizing Texas default judgment and refusing to consider defendant's personal jurisdiction defense as Texas court's determination on that issue was final); *Boorman v. Deutsch*, 152 A.D.2d 48, 52-53, 54 (1st Dep't 1989) (defendant could either litigate the personal jurisdiction issue in the New Jersey action, or default in that action and mount a collateral attack later in New York, but having chosen to raise the jurisdictional question in New Jersey and lost, he could not raise the issue again in New York), *appeal dismissed*, 76 N.Y.2d 889 (1990). It is only because the judgment sought to be recognized here was from a foreign country that petitioners were provided the opportunity to re-litigate their jurisdictional defenses at all (an opportunity that the Court of Appeals held they lost by taking steps to vacate the default judgments and arguing the merits, as provided by CPLR 5305(a)(2)). They should hardly be heard to complain now that by having afforded them that greater opportunity — which only their own conduct forfeited — New York denied them equal protection.

The short answer to petitioners' complaint that, had they been sued in New York in the first instance, they would have been permitted to contest the case on the merits and preserve their jurisdictional defense on appeal (Pet. 28-29), is that New York has no power to transform English judicial practice, no obligation to conform its practice to England's, and good reasons for its practices as regards both domestic

and foreign judgments. The more summary nature of enforcement proceedings (whether for domestic or foreign judgments) promotes such legitimate interests as respect for sister courts, the interests of finality and uniformity in determinations, the interests of New York litigants in foreign courts under principles of reciprocal respect, and well-settled collateral estoppel principles. Those same interests justify the rule of New York (and all the states that have followed the Uniform Act) that actual participation in foreign judicial proceedings, beyond what is necessary to contest jurisdiction, warrants foreclosing further objection to personal jurisdiction.

Petitioners identify no conflict among any courts concerning the constitutionality of this different treatment and no other consideration warranting this Court's review of this unpreserved claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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